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A TREATISE
· ON
THE AMERICAN LAW
OF
LANDLORD AND TENANT.

BY JOHN N. TAYLOR.
60

EIGHTH EDITION.

EDITED

BY HENRY F. BUSWELL.

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TABLE OF CONTENTS.

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VOLUME II.

CHAPTER X.

OF THE TRANSFER OF A LEASE AND ITS CONSEQUENCES.

	PAGE
§ 425. Liabilities of the Parties affect their Successors	1

SECTION I.—*Of Assignments in Fact and in Law.*

§ 426. By Lessor or Lessee.—Pass the whole Estate of the Assignor	1
427. By Operation of Law, when.—Examples.—In Fact, created by Written Instrument	3
428. Particulars of.—What may operate as	4
429. Requisites of a valid Assignment	5
430. What Estates are Assignable	6
431. Covenants in	7
432. Marriage operates as, at Common Law	7
433. Devisee is an Assignee.—Lease a disposable Interest	8
434. Executor or Administrator as Assignee.—Rights of	9
435. Sale under Execution operates as Assignment.—Effect of	10

SECTION II.—*The Rights and Liabilities of an Assignee.*

§ 436. Privity of Estate and Contract	11
437. Takes with Assignor's Rights and Obligations	12
438. Lessee cannot avoid his Obligations by Assigning	13
439. Assignee of Reversion succeeds to Landlord's Rights	14
440. Rule formerly Limited, but now Absolute	16
441. Assignee of Reversion on Parol Leases, Rights of	17
442. Tenant to have Notice of Assignment.—Arrears of Rent	18
443. Liability of, on Covenants running with the Land	20
444. Not Liable on Personal Covenants.—Duration of Liability	21
445. May take Advantage of certain Covenants, when	22

	PAGE
§ 446. In order to Sue, must hold Entire Estate of the Lessor	23
447. After Grant of Reversion, Lessor to sue only on Personal Covenants	24
448. Liability of Lessee's Assignee and Sub-tenant	25
449. Liability of Assignee and Sub-tenant distinguished	26
450. Liable without Actual Entry	28
451. Assignments by Deed, and in Law. — Their Effects distinguished	29
452. Assignment over, generally discharges Future Liability	30
453. Assignment over, Essential to its Validity	30
454. Liability of, on certain Covenants	31
455. Mortgagee generally considered an Assignee	32
456. Liability of Assignee of Insolvent Debtor	33
457. Insolvency as affecting Right to collect Subsequent Rents	35
458. Trustees for Creditors, how far liable for Rent	37
459. Executors and Administrators. — Actions by and against, for Rent	38
460. Bound only by Covenants Running with the Land	39
461. May avoid Liability by Assigning. — How Chargeable	40
462. Heir, how far Chargeable on his Ancestor's Covenants	41
463. Heir of Lessee, Rights of	41

CHAPTER XI.

THE MODES OF DETERMINING A TENANCY.

§ 464. By what Acts or Events terminated	43
--	----

SECTION I. — *By Lapse of Time.*

§ 465. Determines Estate as by Operation of Law	43
---	----

SECTION II. — *By Notice to quit.*

§ 466. Tenancy at Will, Different Ways of Determining	44
467. Tenancy from Year to Year only determined by Notice	46
468. Particulars of	47
469. Tenant under Void Lease or Agreement entitled to	48
470. Successors to Tenant's Estate, when entitled to	48
471. When not necessary. — Examples	49
472. To entitle to, must be Privity. — Acts of Tenant to render Unnecessary	51
473. Acts of Landlord to render Unnecessary	52

TABLE OF CONTENTS.

v

	PAGE
§ 474. Mortgagor in Possession, when Entitled to	53
475. When to be given.— Length of	54
476. Form of	56
477. Day named to correspond to Conclusion of Term	57
478. Waiver by Tenant of Irregularity in	58
479. Must be in Name of Landlord.— By Tenants in Common and Joint Tenants.— Agents.— Partners	59
480. Unauthorized, not cured by subsequent Adoption.— By Receivers.— Corporate Officers	60
481. To whom to be given	61
482. By Landlord, to be in Writing	62
483. Form of Words of.— Description of Premises	63
484. Sufficient Service of	64
485. Waiver of, what Acts constitute	66
486. Subsequent Notice generally a Waiver	67
487. Determines Tenant's Estate absolutely	69

SECTION III. — *By Forfeiture.*

§ 488. Incurred, anciently, at Common Law, when	70
489. Incurred by Breach of Stipulation, when	70
490. Re-entry for Waste	73
491. Of Whole Estate, notwithstanding Severance of Occupation .	74
492. Who may re-enter.— Right Optional.— Tenant's Estate subsists till Re-entry	75
493. For Non-payment of Rent.— Demand a Pre-requisite to, at Common Law	76
494. Demand, how far necessary in different States	78
495. Tenant's Equitable Relief against Re-entry	80
496. Equitable Relief to Tenant, when refused	81
497. Waiver of Forfeiture by Acceptance of Rent	83
498. Waiver by other Acts of the Landlord	85
499. Acceptance of Rent accrued before Forfeiture	86
500. Continuing Cause of Forfeiture not waived by Acceptance of Rent.— Examples	87
501. Waiver of continuous Condition	88

SECTION IV. — *By Merger.*

§ 502. Defined	89
503. How produced	90
504. What Estates will merge.— When Merger not permitted .	91
505. Estates merging must be held in same right.— Exceptions .	92
506. Remote Estate must be as large as, or larger than the Preceding Estate	93

TABLE OF CONTENTS.

SECTION V. — *By Surrender.*

	PAGE
§ 507. Defined. — By Express Words, or Operation of Law	93
508. To whom to be made	95
509. To be by Written Instrument	96
510. Words to Create. — By Construction	98
511. Destruction or Cancellation of Deed not a Surrender	99
512. By Operation of Law. — Acceptance of new Lease	99
513. Operation of New Lease to Create	101
514. By Parol Acts	103
515. By change of Possession. — Implied from Acts of Parties . .	104
516. Underletting. — Substitution. — Effect of Each	106
517. To discharge Tenant, Agreement to Substitute must be mutual	107
518. Effect of, on Rights of Parties	108

SECTION VI. — *Contingent Modes of Dissolving a Tenancy.*

(a.) PREMISES TAKEN FOR PÚBLIC USE.

§ 519. Legal Taking avoids outstanding Lease	109
--	-----

(b.) DESTRUCTION OF PREMISES.

520. In Absence of Covenant, extinguishes the Lease	111
---	-----

(c.) USING THE PREMISES FOR AN ILLEGAL PURPOSE.

521. When immoral User of the Premises avoids the Lease	113
---	-----

(d.) TENANT'S DISCLAIMER.

522. What. — When it avoids the Lease	115
---	-----

CHAPTER XII.

THE CONSEQUENCES OF A DISSOLUTION.

§ 523. Respective Rights of Parties on Termination of Tenancy . .	118
---	-----

SECTION I. — *The Liability of a Tenant holding over.*

§ 524. Duty of, to surrender. — Liability for Rent continues	119
525. Bound by Terms of the original Demise	121
526. When a Trespasser. — By Statute	123
527. Demand of Possession a Pre-requisite to Suit	124
528. Notice to Tenant in Possession required. — When to be given	125
529. Statute Penalty in certain Cases. — Double Rent	126
530. Action for Special Damages	127

SECTION II.—*Mutual Privileges after Dissolution.*

	PAGE
§ 531. Forcible Entry by Landlord under Plea of Title	128
532. Landlord may enter subject to Indictment for Excessive Force. — Contrary Authority	129
533. Tenant's Right to remove his Effects	132

SECTION III.—*Tenant's Right to Emblements.*

§ 534. Right defined. — To what things it extends	134
535. In what cases Right attaches	135
536. Does not attach to a Defined Tenancy for Years	137
537. In Tenancies at Will. — Of Mortgagees	138
538. Custom in favor of Tenants for Years	139
539. Custom not to control Written Instrument	140
540. Custom a part of the Contract when not repugnant	141
541. Manure, when to be returned to the Soil	143
542. Mutual Privileges founded on Usage	145
543. Right lost by Tenant's Acts. — General Right to remove	146

SECTION IV.—*The Tenant's Right to remove Fixtures.*

§ 544. Fixtures, what. — As between Grantor and Grantee. — Between Landlord and Tenant	147
545. Trade Fixtures, what	150
546. Things required for Purposes of Trade are	152
547. Domestic Fixtures, what	153
548. Erections for Agricultural Purposes. — Differing Rules as to .	155
549. How far Personal Property. — Removal of	157
550. Must be capable of Removal without Injury to the Freehold .	158
551. Time within which Tenant may remove	159
552. Renewal or Surrender as determining Right to remove . . .	162
553. Title to, vests in Landlord on Tenant's quitting Possession .	164
554. Custom as to particular Articles. — Agreements	164

CHAPTER XIII.**THE LANDLORD'S REMEDIES.**

§ 555. Respective Remedies of the Parties, what	167
---	-----

SECTION I.—*Of a Distress for Rent.*

§ 556. History of the Remedy	168
557. Nature of the Remedy	169
558. In what States it exists	170

	PAGE
§ 559. How Limited in Certain States	172
560. Lies for all Rents reserved on Lands or Tenements	173
561. Actual Demise at fixed Rent a Pre-requisite to	174
562. Certain Rent. — Tenant not in Full Possession	175
563. Actual Demise essential to. — Agreement to Lease insufficient	176
564. Holding over, Effect of on the Right. — Other Circumstances	177
565. Effect of Judgment for Rent. — Note. — Bond. — Agreement for Re-entry. — Surrender, etc.	178
566. Previous Demand not necessary. — Tender, effect of	180
567. In whose Name to be Levied	181
568. Assignee of Reversion may distrain	182
569. By Joint Tenants. — Coparceners. — Tenants in Common .	182
570. By Husband and Wife. — Guardians. — Executors. — Receivers	183
571. By Mortgagees	184
572. As respecting Duration of Term, when to be made	184
573. As respecting Rent-day, when may be made	186
574. Generally, to be made on the Premises yielding the Rent .	187
575. Pursuit of Chattels removed to avoid Distress. — Estrays, when liable	188
576. Of Goods removed. — Rules in certain States	188
577. Goods of Strangers generally not Liable after Removal .	190
578. Sufficient Acts of Distraint. — Entry to Distraint	191
579. By whom to be Levied	192
579 a. Landlord's Affidavit; Particulars of	193
580. Warrant of Distress; Particulars of	194
581. Arrears of Rent Included, but not Damages	195
582. Inventory and Custody of the Goods	195
583. All Movables on Premises subject to, at Common Law. — Rule Changed in Certain States	196
584. Distraint of Property of Strangers. — Observations	197
585. Statutory Exemptions from Distress	198
586. Exemptions from Distress at Common Law	199
587. Of Things in the Hands of Artificer or Merchant	200
588. Of Things brought on the Premises in ordinary Course of Business	201
589. Of Things delivered to a Common Carrier, Auctioneer, Manu- facturer	201
590. Exemption by Landlord's Consent. — Goods consigned for Sale	202
591. Animals Ferae Naturae	203
592. Fixtures not distrainable until severed from the Freehold .	203
593. Goods sold generally not distrainable	203
594. Goods in Custody of the Law	204
595. In hands of Officers of Court. — Of Boarder in Boarding-house	205
596. Of Foreign Ambassadors and Ministers. — Things in actual Use	205
597. Beasts of the Plough; Sheep; Implements of Trade. — Cattle of Stranger	206

	PAGE
§ 598. Goods in Execution; Landlord's Statutory Remedy against	207
599. Attaches only to Goods on the Premises	208
600. Contemplates an existing Tenancy	208
601. Goods of Strangers.— Execution is for accrued Rent only	209
602. Statute for Benefit of Immediate Landlord only	209
603. Form of the Statutory Proceeding	210
604. Liability of the Officer under the Statute	211
605. Landlord's Duty in respect of Goods distrained	212
606. Goods in charge of Pound-keeper	212
607. Tenant to have Notice in Order to Redeem	213
608. Landlord not to use distrained Property, generally	214
609. Property may be sold.— Appraisal and Notice	214
610. Sale to be made within Reasonable Time.— Application of Proceeds	215
611. Penalty for Clandestine or Fraudulent Removal of Goods	216
612. Aiding Fraudulent Removal or Concealment	217
613. Landlord Trespasser ab initio at Common Law, when	218
614. Rule changed by Statute	219

SECTION II.— *The Action of Debt for Rent.*

§ 615. Remedy to recover Rent, as such, with Interest	220
616. To maintain Rent due must be Ascertainable	221
617. May be maintained upon a Lease	221
618. So, after Entry for Forfeiture, for Rent accrued	222
619. At Common law, not maintainable before Determination of Freehold Lease	222
620. Rests on Privity of Estate or Contract.— Liability of Mesne Lessee	223
621. By Assignee of the Reversion	224
622. Against the Tenant at Sufferance	225
623. Tenant, when liable for Double Rent	226
624. Form of Declaring on	226
625. When Transitory.— When Local	227
626. Against the Executor, Form of	228
627. Tenant's Interpleader	229
628. Against an Infant	229
629. Tenant estopped to deny his Landlord's Title	230
630. Not the Subject of Set-off	231
631. But subject to Tenant's Recoupment	232
632. Lies in behalf of Subsequent Mortgagee, when	233
633. Plea of Tender	234
634. Tender of Money.— Of Specific Articles	234

SECTION III. — *The Action for Use and Occupation.*

	PAGE
§ 635. When maintainable. — Seeks as Damages an Equivalent for Rent	235
636. To maintain Relation of Landlord and Tenant must subsist	237
637. Will not lie after Tenant's Estate is determined or disowned	239
638. Lies for Enjoyment of Incorporeal Hereditaments. — Examples	241
639. Maintainable by Assignee of Reversion. — Not by Parties not in Privity	241
640. Form of Declaring in	242
641. Defendant's Possession requisite. — Constructive Possession	243
642. Against Tenant holding over	245
643. Against Assignees. — Executors or Administrators. — Partners	246
644. Not against Persons Occupying for Immoral Purpose	246
645. After Destruction of Premises by Fire	247
646. Bad Condition of Premises not a Defence. — Recoupment	247
647. Against Tenant abandoning	248
648. Holding being ended by Landlord's Act, Action will not lie	248
649. Eviction, Effect of on the Remedy	249
650. Rent ascertainable from Void Lease	250
651. Form of Declaring. — Action is transitory	250
652. Against Assignees of Bankrupt	251
653. Facts to constitute Defence	252
654. Defendant not to impeach Lessor's, but may set up his own, Title; or Eviction	253
655. Evidence to support the Action	254

SECTION IV. — *Of a Suit in Equity for Rent.*

§ 656. Generally, when Equity will decree Payment of Rent	255
657. Specific Cases in which Payment may be decreed	256
658. Cases of Mutual Accounts. — Discovery	257
659. Against Under-tenants. — Relief when refused	258
660. Accounts for Rents and Profits	259

SECTION V. — *The Action of Covenant.*

§ 661. Lies on Agreements under Seal	260
662. Lies after Lessor's Assignment. — Alternative with Debt, when	261
663. Lies for Unliquidated Damages. — Includes General Damages	261
664. Lies only in Favor of Owner of Legal Interest. — Joinder of Plaintiffs	262
665. By Tenants in Common of the Reversion, how brought	263
666. Requisites to maintain. — When Assumpsit lies	264
667. When to be brought by the Executor	264

	PAGE
§ 668. Against Joint, and Joint and Several Covenantors	265
669. Executors and Administrators, how bound.—When personally liable	266
670. Venue.—Form of Declaring	267
671. Covenants secured by Bond	268
672. Judgment and Execution in Action on Bond	269
673. Sum fixed considered as Penalty or Damages	269
674. Breach of Covenant, how assigned	270
675. Negative Covenant, Breach of, how assigned	271
676. Defendant's Plea of Performance	272
677. For Rent.—Tenant's Plea of Eviction	273
678. On Covenant for Quiet Enjoyment.—Ouster to be Alleged .	273
679. Partial Eviction, when a Defence	274
680. Plea of Assignment	274
681. Payment after Rent-day not a Defence.—Exception.—Discharge of Covenant	275
682. Damages not to be Set off.—May be Recouped.—Statute of Limitations.—Bankruptcy	276
683. Dependent Covenants.—Performance of, by the Plaintiff, essential	277
684. Assignments, how proved	277
685. When Equity will relieve Covenantee	278

SECTION VI.—*Actions for Waste.*

§ 686. When and by whom maintainable	279
687. Action on the Case for Waste	280
688. Assumpsit.—Case, concurrent with Covenant	281
689. Common Law Action for, Personal.—Executors and Administrators, how Chargeable for	282
690. Equitable Remedy in New York	282
691. Injunctions to prevent Waste	283
692. Remedies in Special Cases	285
693. Injunction in Special Cases	286
694. Equitable Relief not restricted to the Reversioner	286
695. Granted only for Substantial Injury to the Freehold	288
696. Generally not granted to a doubtful Title	289
697. Injunction against Life-tenant without Impeachment of waste	290

CHAPTER XIV.

OF POSSESSORY REMEDIES.

SECTION I.—*The Action of Ejectment.*

	PAGE
§ 698. Nature of the Action.—Founded on Claimant's Right of Possession	291
699. When it lies	292
700. Landlord's right to re-enter.—Demand	293
701. In New York, Landlord entitled to Judgment, when	294
702. Demand and Notice to Quit.—When necessary	295
703. By a Mortgagee.—Form of	296
704. Complaint in.—Premises how to be described	298
705. Proof of Title not Required	299
706. Tenant's Estoppel to deny Title	302
707. When Estoppel does not arise	304
708. Matters of Defence not barred by Estoppel	306
709. Tender or Payment of Rent.—Effect of	309
710. Mesne Profits, Plaintiff entitled to.—How Computed.—Separate Action for	309
711. Mesne Profits, Mesne Lessee generally not liable for.—Defences to Action for	310
712. Mesne Profits, Executors and Administrators as such, not liable for.—Matters of Proof in Action for	311

SECTION II.—*Summary Proceedings to Recover Possession.*

§ 713. To what Cases applicable.—Determine Right of Possession merely	312
714. New York.—Lessor when entitled to Possession	314
715. Vacant Possession, what amounts to	315
716. Statutory Proceeding on Vacant Possession	316
717. Forcible Entry and Detainer distinguished from Summary Process	317
718. Notice in Writing a Pre-requisite to Statutory Proceeding	320
719. Jurisdiction.—Statutory Liability of Judges	322
720. When Proceedings lie	323
720 a. Plaintiff must be entitled to Immediate Possession	326
721. Statutory Proof Required	327
721 a. Particulars of Affidavit	328
721 b. Summons to be Issued	330
722. Service of Summons	331
722 a. Service on Under-Tenant	332

	PAGE
§ 723. Trial, Tenant's Right to.—How conducted	333
724. Trial.—Matters of Proof.—Witnesses	335
725. Warrant to remove Tenant.—Effect of	338
726. Stay of Proceedings	338
727. Payment or Tender by Tenant.—Effect of	339
728. <i>Certiorari</i> .—Effect of, and Proceedings upon	340
728 <i>a</i> . Appeal from Magistrate	343

CHAPTER XV.

THE TENANT'S REMEDIES.

SECTION I.—*Actions for a Wrongful or Irregular Distress.*

§ 729. When Tenant may have Replevin, Trespass, or Action in the Case	348
730. Unreasonable or Excessive Distress, what	349
731. Liability of Landlord how fixed	350
732. Remedy in Trespass for Distress when no Rent due	351
733. Unlawful Acts of Landlord	351
734. Landlord's Rights in Special Cases	352
735. Distress for more Rent than is due.—Taking Exempted Property	352
736. Form of Action in certain Cases	353
737. Irregularities which do not render the Distress unlawful	354
738. Under-tenant's Remedy in Case of Distress	354

SECTION II.—*The Action of Replevin.*

§ 739. When it lies.—Statutory Provisions regarding	355
740. Execution of Writ.—Bond.—Pledges	356
741. Duties and Liabilities of the Officer as to the Bond	357
742. Practice in Actions on the Bond	358
743. Plaintiff bound to due Diligence in Prosecution	358
744. Death of Plaintiff, Effect of on the Action	359
745. Liability of Plaintiff's Sureties	360
746. Duties of the Officer	361
747. Claim of Property by Defendants or Another.—Practice	361
748. What Property subject to Replevin	362
749. Plaintiff's Right to Goods, in order to Maintain	363
750. Cases in which the Action lies	364
751. Venue of the Action	365
752. Form of Declaring	366

	PAGE
§ 753. Defendant's Pleas in	366
754. Effect of Certain Pleas.— Of the General Issue	367
755. Cognizance and Avowry	368
756. Avowry in New York	369
757. Plea of Tenant in Avowry	370
758. Place.— Abuse of Distress.— How Pleaded	372
759. Verdict in Avowry; its Effect	373
760. Avowry by Joint Tenants and Tenants in Common.— Execu- tors.— Husband	373
761. Practice in Avowry	375
762. Judgment in Avowry	376
763. Execution in Avowry.— Service of	377

SECTION III.— *Action of Trespass.*

§ 764. By Tenant; for what Injuries it lies	378
765. Illegal Entry a Trespass.— Between Disseisor and Party in Possession	378
766. Acts constituting Trespass	380
767. Unlawfully taking or injuring Property	380
768. Incorporeal Rights not the Subjects of	381
769. Right to Immediate and Exclusive Possession essential to maintain	382
770. Action lies for Severance of Fixtures, when	383
771. For Felling and Carrying away Trees, when	384
772. For Injury to Realty, Persons in Actual Possession may main- tain.— Examples	385
773. To maintain, Constructive Possession sufficient in the United States	386
774. Against Intruders on Land.— Against Landlord	387
775. License to Owner to enter.— When implied	387
776. Abuse by Landlord of lawful Authority.— Wrongful Distress	389
777. Trespass concurrent remedy with Trover, when	390
778. For a continuing Nuisance	391
779. Case and Trespass, when each lies	391
780. Case lies for Consequential Injuries	392
781. Abuse of Distress.— Excessive Distress	392
782. Principle to determine Form of Action to be brought	393
783. Case for Damages, when it lies	394
784. Case for Injury for Incorporeal Rights	394
785. Action Personal.— Statutory Exception in New York	395

CHAPTER XVI.

OF FORCIBLE ENTRY AND DETAINER.

	PAGE
§ 786. History of the Action	396
787. Acts to Constitute Forcible Entry and Detainer	398
788. Entry by force, when justified	400
789. Who may maintain the Action	401
790. Allegations necessary in order to Maintain	403
791. Form of Proceeding	405
792. Title, how far in Issue.—Possession Essential	407
793. Judgment for Restitution	409
794. Indictment for, when supported	410
<hr/>	
APPENDIX	413
INDEX	521

THE LAW OF LANDLORD AND TENANT.

CHAPTER X.

OF THE TRANSFER OF A LEASE, AND ITS CONSEQUENCES.

§ 425. Liabilities of the Parties affect their Successors.—The rights and liabilities of the respective parties to a lease, which we have been considering, are not confined to the immediate parties thereto, but will be found to attach to all persons to whom the estate may be transferred, or who may succeed to the possession of the premises, either as landlords or tenants. This result follows as a necessary consequence of that privity of estate which we have seen is incident to the relation of landlord and tenant, and which carries with it all these obligations which the original parties agreed should attach to and continue to regulate that relation. Let us first observe the different modes of effecting an assignment; and next, the various rights and liabilities of the parties connected therewith.

SECTION I.

OF ASSIGNMENTS IN FACT AND IN LAW.

§ 426. By Lessor or Lessee.—**Pass the whole Estate of the Assignor.**—An assignment of a lease is the transfer of a tenant's whole estate therein to some third person; and such

a transfer may be made by either of the parties to the lease, if not restricted by some stipulation contained therein.¹ A general grant of the reversion passes all the leases to which the property is subject, including the rents reserved, as incident to the grant. But a lessor may assign the rent to become due upon a lease, without assigning the reversion; or, he may grant the reversion, and by special words reserve the rent.² An assignment *differs from a lease* in this, that by the latter the lessor grants an interest less than his own, reserving to himself a reversion; but by an assignment he parts with the whole of his interest in the estate. An assignment may not only reserve rent to the assignor, but the deed may contain covenants which were not in the original lease to him; and it may even purport to convey a larger interest than the assignor himself possessed.³ If the grantor conveys a shorter term, or a less estate, than he himself had in the premises, or if a lessee for life grants a term of years, pro-

¹ In Kentucky, by statute, every transfer or assignment of the term or interest by a tenant at will or at sufferance, or one who has a term of less than two years, works a forfeiture. But the statute is held not to apply to the case of an assignment of the unexpired term of a lease for more than two years, the unexpired term being less than two years. *Grizzle v. Pennington*, 14 Bush, 115.

² *Willard v. Tillman*, 2 Hill, 274; *Dixon v. Nicolls*, 39 Ill. 372; *Watson v. Hunkins*, 13 Iowa, 547; *Patten v. Deshon*, 1 Gray, 325; *Ryerson v. Quackenbush*, 2 Dutch. 236; *Childs v. Clark*, 3 Barb. Ch. 52; *Leonard v. Burgess*, 16 Wisc. 41; *Hunt v. Thompson*, 2 Allen, 341. But such an assignment of the rent only will not prevail against a prior grant of the reversion even by mortgage. *Kimball v. Pike*, 18 N. H. 419. In *Newbould v. Comfort*, 2 Clark, Pa. 331, such an assignment of the rent alone is denied to be valid in that State. The power of assignment is incident to the estate of a lessee, without the word "assigns," unless expressly restricted. *Church v. Brown*, 15 Ves. 264; *Greenaway v. Adams*, 12 id. 395; *ante*, § 108.

³ *Palmer v. Edwards*, 1 Doug. 187, n.; *Pluck v. Digges*, 5 Bligh, n. s. 31; *Baker v. Gostling*, 1 Bing. (N. C.) 19. But it is held in Massachusetts that if by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions with a right of entry, or new causes of forfeiture are created, then the tenant holds by a different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term. *McNeil v. Kendall*, 128 Mass. 245; *Dunlap v. Bullard*, 131 id. 161.

vided the life should so long continue, this is not an assignment of the freehold, but only a grant of a term; and will, in neither case, amount to anything more than an under-lease.¹ So, where the assignee of a lessee demised the premises for the residue of the term, reserving the delivery of possession to himself at the end thereof, and the intermediate possession in case the buildings were destroyed by fire,—the demise was held to be an under-lease, and not an assignment of the term.² The result was said to be the same where an under-tenant had covenanted to surrender his possession to the original lessee at the end of the term.³

§ 427. By Operation of Law, when.—Examples.—In Fact, created by Written Instrument.—An assignment is either in fact, by the voluntary act of the parties, or by operation of law. An assignment in law occurs wherever, without a voluntary conveyance, the estate is, upon some particular event, transferred by mere operation of law; as by marriage, where the husband acquires a right to his wife's leasehold property and other effects; or by the sale of a lease under an execution issued against the lessee, when the purchaser becomes the assignee in law of the sheriff.⁴ So where a man dies possessed of a term of years, the law vests it in his personal representatives, unless he has disposed of it by will.⁵ As to an assignment in fact, we may observe, that a mere *verbal* assignment of a lease for years is void under the Statute of Frauds, which declares, that no estate or interest in lands, other than leases for a term not exceeding one year, shall be

¹ Derby *v.* Taylor, 1 East, 502.

² Post *v.* Kearney, 2 N. Y. 394; Farnham *v.* Holden, 90 Ill. 312; Webster *v.* Nichols, 104 *id.* 160. In what instances and to what extent an under-lease may be created, notwithstanding the whole term is parted with, has been stated *ante*, § 16, and notes.

³ Martin *v.* O'Connor, 43 Barb. 514; Collins *v.* Hasbrouck, 56 N. Y. 157; Ganson *v.* Tiff, 71 N. Y. 48.

⁴ McNeil *v.* Ames, 120 Mass. 481; Derham *v.* Berry, 5 Phila. 475; Lancashire *v.* Mason, 75 N. C. 455. So where sureties of the lessee had the lease sold and bought it in themselves, they became assignees and liable for the rent. Borland's Appeal, 66 Pa. St. 470.

⁵ Martin *v.* Tobin, 123 Mass. 85.

granted, *assigned*, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party granting or *assigning* the same, or by his lawful agent, thereunto authorized by writing.¹ But although an express assignment of a term of years can only exist by deed or writing, it is not necessary that the writing be under seal, even if the lease to be transferred is a sealed instrument.² An assignment made by the assignor in blank, who affixes his seal on the back of the lease, to be afterwards filled up by a third person, which is done accordingly, is neither a deed nor a note in writing within the statute, but is wholly void.³

§ 428. **Particulars of.—What may operate as.** — An assignment is usually made by the words *grant*, *assign*, and *set over*, but no particular mode of expression is necessary for the purpose, provided the intention of the parties sufficiently appears from the instrument.⁴ No consideration need be expressed in it, for the liability of the assignee to pay the rent reserved by the lease is a sufficient consideration.⁵ An order drawn by a

¹ 2 N. Y. R. S. 134, § 6; *Welsh v. Schuyler*, 6 Daly, 412; and see *Bolting v. Martin*, 1 Camp. 318.

² *Hess v. Fox*, 10 Wend. 436; *Holliday v. Marshall*, 7 Johns. 211; *Beck v. Phillips*, 5 Burr. 2827; *Bolting v. Martin*, 1 Camp. 318. In Massachusetts an assignment of a lease under seal was held necessary to be itself under seal in order to bind or entitle the assignee of the lessor. *Bridgham v. Tileston*, 5 Allen, 371; *Wood v. Partridge*, 11 Mass. 488. But as a lessee holds both by privity of contract and estate, though he can transfer the former only by an instrument under seal if the lease is under seal, yet he may assign the leasehold estate, however long, by an instrument in writing sufficient under the Statute of Frauds. *Sanders v. Partridge*, 108 Mass. 556, and *Brewer v. Dyer*, 7 Cush. 337, is so far overruled.

³ *Jackson v. Titus*, 2 Johns. 430. By U. S. act of June 30, 1864, a revenue stamp was required upon every assignment, but this requisition was removed by the act of 1872.

⁴ An assignment not under seal, conveying "all the use" of certain premises, the assignor not holding the existing leases, is not specific enough to give the assignee a right to the rent accruing under the leases. *Spicer v. Bonker*, 45 Mich. 630, per Cooley, J.

⁵ Noy's Max. 92; *Barker v. Keate*, 1 Mod. 263; s. c. 2 *id.* 252. It is unnecessary to inquire whether an assignment passes the legal title, in order to determine whether the assignee may sue in his own name; for,

landlord on his tenant, to pay accruing rent to a third person, operates as an assignment of the rent; and the tenant is bound to pay to such person, whether he has accepted the order or not, and notwithstanding a subsequent notice from the landlord not to pay.¹ In some cases, also, a transfer will be implied, although an actual delivery of the instrument has not taken place; as, where a lease was sold at auction, and the purchaser paid the deposit-money, and the vendor's solicitor prepared the assignment, but would not deliver it until his fees were paid, Lord Ellenborough held that the assignment was complete, although the deed had never been delivered to, or accepted by the purchaser.² But the transfer of a mere equitable interest will not make a man an assignee,—as, by the delivery and deposit of a lease as security for money, without any written assignment; for though it may create a right in equity, it passes no interest at law.³

§ 429. Requisites of a valid Assignment.—To constitute an assignment of the lease, it must appear that the assignee claims

whether his title be legal or equitable, he may maintain an action, if he has the whole interest. *Hastings v. McKinley*, 1 E. D. Smith, 273.

¹ *Bradley v. Root*, 5 Paige, 632; *Weston v. Barker*, 12 Johns. 279. At law, as well as in equity, an order for value is, *per se*, an equitable assignment to the payee of the fund on which the order is drawn. *Morton v. Naylor*, 1 Hill, 583.

² *Odell v. Wake*, 3 Camp. 394. An alteration in the landlord's receipts for rent, of the names of the occupying tenants, does not, unless known to have been assented to by all the parties interested, afford any evidence from which either a change of tenancy or any transfer of legal rights can be inferred. *Bourke v. Bourke*, 8 Ir. R. C. L. 221.

³ *Doe v. Roe*, 5 Esp. 105; *Moores v. Choat*, 8 Sim. 508; *Moore v. Greg*, 2 De G. & S. 334. To vest title in an assignee, there must be an unconditional delivery of the assignment. Where it is delivered to a third person, to be delivered to the assignee on payment of the purchase-money, the delivery is incomplete; no title passes by a delivery without payment. *Peabody v. Fenton*, 3 Barb. Ch. 451. But, in an action for rent against one alleged to be an assignee, the question is not whether the defendant is assignee by a valid instrument as between him and the lessee, but whether he has held himself forth as such. Indirect proof is sufficient to establish the relation of assignee; and to show its termination, and that a new occupant was received as assignee. *Carter v. Hammett*, 12 Barb. 253; s. c. 18 *id.* 608; *Armstrong v. Wheeler*, 9 Cow. 88.

through, and is in of, the same estate as the person whom he succeeds; for if he comes in by an elder title, he is not an assignee.¹ But the fact of demised premises being found in the possession of one not named in the lease raises a presumption that he is in as assignee of the lessee, and not as under-tenant; especially if it appears that he has paid rent to the original landlord.² In a case of debt for rent, stating the demise of a messuage by the plaintiff to W. H. for one year, and so on from year to year if they should respectively please, at the yearly rent of £140, payable quarterly, and an assignment by W. H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to W. H. for seven years, at £140 a year; that no lease had been actually executed, but that W. H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of £140 a year: it was held that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which W. H. had an assignable interest, so as to charge the defendant as his assignee.³

§ 430. What Estates are Assignable.—We have seen that every estate or interest in lands is transferable, though the interest be in the future. Thus, a term of years to commence *in futuro* may be assigned, for the interest is vested *in praesenti*, though it does not take effect till a future time.⁴ Even a possibility of a term is assignable in equity for a good consideration, but not in law; and though a contingent interest which a husband has in right of his wife, or the possibility of a term thereafter to vest, is not strictly good by way of assign-

¹ Chaworth *v.* Phillips, Moore, 876; Roach *v.* Wadham, 6 East, 289; Jeherwood *v.* Oldknow, 3 M. & S. 382; Whitfield *v.* Howe, 2 Show. 57.

² Acker *v.* Witherell, 4 Hill, 112. So Bedford *v.* Terhune, 30 N. Y. 453; Shee *v.* Gray, 15 Ir. C. L. 296; but this presumption may be rebutted: *id.* Where a lessee takes in a co-occupant, no such presumption arises. Austin *v.* Thomson, 45 N. H. 113; Carver *v.* Palmer, 33 Mich. 342, where a lessee who was a trader took one in to occupy with him and work in his shop.

³ Braythwaite *v.* Hitchcock, 10 M. & W. 494.

⁴ Com. Dig. tit. Assignment; *ante*, §§ 15, 72.

ment, yet either will operate as a valid agreement, when done for a valuable consideration; but it must be an assignment of that particular thing, and not rest only in intention, and the construction of words in a covenant.¹ A power coupled with an interest is assignable, though a bare power is not; therefore, if a lease be made with an *exception of the trees*, and a power be reserved to the lessor to enter and cut them down, he may assign this power to another person; but if it be not strictly pursued, the lessee may maintain trespass both against the lessor and his assignee. And if in a lease for years, of lands *excepting the woods*, the lessor grants the trees to the lessee, and assigns the land over to another, the trees do not pass by this assignment to the assignee.²

§ 431. Covenants in.—Any covenants may be introduced into an assignment of lease which are pertinent to the subject, and shall have been agreed upon by the parties. But the proper covenants on the part of an assignor are, that the indenture of lease is good in law; that he has power to assign;³ that he will save the assignee harmless from former grants and incumbrances; and for quiet enjoyment. On the part of an assignee they are, that he will pay the rent, and perform the services and covenants mentioned in the lease, or save the assignor harmless therefrom.⁴

§ 432. Marriage operates as, at Common Law.—Marriage was at common law an assignment in law to the husband of the wife's chattels real; and all her terms for years became

¹ *Theobalds v. Duffoy*, 9 Mod. 102; *Chandos v. Talbot* 2 P. Wms. 608.

² *Warren v. Arthur*, 2 Mod. 317; *Greene & Harris's Case*, Godb. 128
A grantee of a reversion of leasehold premises who takes an assignment of the lease after the rents have been assigned to another person may be held liable, as assignee of the lessee, to the assignee of the rent. *Childs v. Clark*, 3 Barb. Ch. 52.

³ But this has been held to be implied from the mere contract to assign, and so also is the title of the lessor. *Bensel v. Gray*, 38 N. Y. Supr. 447; *Souter v. Drake*, 5 B. & Ad. 992; and see *ante*, § 254.

⁴ Under this covenant lessee may recover all costs and proper expenses incurred in defending an action by the lessor for a breach by the assignee. *Howard v. Lovemore*, L. R. 6 Exch. 43.

thereby absolutely vested in him; so that he might sell, mortgage, or otherwise dispose of them without her concurrence. They were liable, also, to be taken in execution to satisfy his debts.¹ If he disposed of the wife's term, reserving rent, the rent after his death belonged to his executor, and not to the wife.² But if he made no disposition of them during his lifetime, he could not devise them by his will; for the wife, after his death, took the same in her own right, without administering upon her husband's estate. Yet, if he survived his wife, he took them all by survivorship.³ But although a husband might assign or mortgage his wife's chattels real, free from her contingent right of survivorship, it must have been upon a *valuable* consideration; for if it were a mere *voluntary* assignment, it would not bind her if she survived him.⁴ We have, however, in a former part of our work seen a variety of statutory modifications of these common-law principles, to which we need here only refer.⁵

§ 433. Devisee is an Assignee.—Lease a disposable Interest.— A devisee is also an assignee in law, and, as such, is liable to an action upon all covenants in the lease that concern the land, such as to pay rent and to repair;⁶ and, in general, he may maintain all such actions as an assignee of a lease ordinarily may, and which have already been mentioned.⁷ A lease being an interest in lands which a man may dispose of by will, such a disposition, of course, takes effect upon the death of the proprietor, vesting, in the first instance, in the executor, by virtue of his office; and the legatee cannot enter without the consent of the executor; but if he dies without making a will, his leasehold property will go to his administrator by operation of law.⁸ At common law, if a person died seised of any species of rent in arrear, neither the heir nor executor could maintain an action of debt for such rent; the heir, because he was a stranger to the personal contracts of

¹ Co. Lit. 46, b; 351, a.

² Bac. Abr. Baron & Feme (C), 2.

³ Co. Lit. 351, b.

⁴ Schuyler v. Hoyle, 5 Johns. Ch. 196.

⁵ *Ante*, §§ 101-107.

⁶ Holford v. Hatch, Doug. 183.

⁷ Com. Dig. tit. Covenant (B. 3).

⁸ Doe v. Maberly, 6 C. & P. 126.

his ancestor, and the executor, because he did not represent his testator, as to any contract relating to the freehold and inheritance.¹ To obviate this inconvenience, it was enacted by statute 32 Hen. VIII. c. 37, that an executor or administrator of any person seised of such rents, might maintain debt against the person who ought to pay the same, and his personal representatives.²

§ 434. Executor or Administrator as Assignee.—Rights of.—An executor or administrator takes as assignee, by virtue of his office, all leases for years of land, rents, or the like, corn growing or cut, trees and grass cut and severed, together with all arrearages of rent that are due to the lessor at the time of his death. So that, if a lease be made to a man for twenty years, without naming his executor, administrator, or assigns, the executor or administrator will, notwithstanding, have it during the remainder of the term.³ In the case of a tenancy from year to year, or as long as both parties please, if the tenant die without making a will, his administrator has the same interest in the land which the deceased had; for whatever chattel interest the intestate had during his lifetime must vest in his administrator, as his legal representative.⁴ But an executor or administrator cannot have the trees and grass growing on the ground, any more than the soil or ground on which they grow; for these belong to the heir. If a lease of land be made for life or years, whereon a house is standing, or timber growing, and the house be prostrated, or the timber be cut, or fall down, no matter by what means, the materials of the house and the timber become chattels, and if the lease be *without impeachment of waste*, will go to the lessee, and, after his death,

¹ Co. Lit. 162, a. But if the lessor was but a life tenant his executor, &c., had debt at common law. *Hool v. Bell*, 1 Ld. Ray. 172.

² So in N. Y. by R. S. 747, § 21; and a right to distrain is also given.

³ Shep. Touch. 468; *Nimmo v. Commonwealth*, 4 Hen. & M. 57; *Gutzweiler v. Lackmann*, 39 Mo. 91. And one by entering and receiving rent may become executor *de son tort*, and liable as assignee. *Williams v. Heales*, L. R. 9 C.P. 177; *Paull v. Simpson*, 9 Q. B. 365. But an administrator cannot surrender a lease and take another in his own name. *Keating v. Cruden*, 68 Pa. St. 75.

⁴ *Doe v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 393.

to his executor or administrator; but if there be no such exemption in the lease, they go to the lessor, and, after his death, to his executor or administrator. But if the timber be cut for repairs only, or if the lessee employs the materials of the house to build it again, and the lease continues, it may be so employed, and then the executor or administrator of the lessor may not take it.¹

§ 435. Sale under Execution operates as Assignment.—Effect of.—We have stated that the sale of a term of years, by a sheriff under an execution, takes effect as an assignment in law. But if a lease is taken in execution against the landlord, the sheriff cannot turn the tenant out of possession; but it seems he may put a vendee in possession, when he sells a term in possession of the debtor.² Upon such a sale, he must execute an assignment of the lease, in writing, to the purchaser; and if he merely puts the execution creditor in possession, the debtor may recover it again in ejectment.³ Such an assignment will be valid if made at any time subsequent to the return of the execution, provided the sale took place before the writ was returnable.⁴ When a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately, if he cannot find a purchaser for the whole.⁵ In making the assignment to the purchaser, he need not state the particular interest which the defendant has, for he may not be able to ascertain precisely what that is; it will be sufficient to state that the defendant is possessed of a term of years yet to come and unexpired in certain property, and to assign all his interest therein generally. And, in fact, this is the more prudent way of stating the defendant's interest; for if the sheriff should fail in his particular statement, the purchaser will not have a good title.⁶ If the writ be against one of two partners, the sheriff may seize their joint property, although in undivided moieties; he may, therefore, sell an undivided moiety, and the

¹ Shep. Touch. 169, 471.

² Taylor *v.* Cole, 3 T. R. 292; and see McNeil *v.* Ames, 120 Mass. 481.

³ Doe *v.* Jones, 9 M. & W. 372.

⁵ Barnard *v.* Leigh, 1 Stark. 43.

⁴ Doe *v.* Donston, 1 B. & A. 230.

⁶ Doe *v.* Brawn, 5 B. & A. 243.

vendee will be tenant in common with the other partner.¹ And where an outgoing tenant agreed to assign the remainder of his term, it was held that the sheriff, before an assignment had been made, might sell the term under an execution against the tenant, and put upon it the value agreed to be given by the incoming tenant.² Upon all such sales the purchaser becomes an assignee in law, and as such is liable upon the covenants contained in the lease; and is entitled to all such rents as accrue after the acknowledgment of the sheriff's deed, while the lessee continues liable on his contract, notwithstanding the lease may have been taken from him without his consent.³

SECTION II.

THE RIGHTS AND LIABILITIES OF AN ASSIGNEE.

§ 436. Privity of Estate and Contract.—A lessee, during his occupation, holds both by privity of estate and of contract. His privity of estate depends upon and is co-existent with the continuance of his term. By an assignment, he divests himself of this privity, and transfers it to his assignee; it remains annexed to the estate, into whose possession soever the lands may pass, and the assignee holds in privity of estate with the original landlord. The privity of contract, however, is not transmitted to the purchaser by an assignment of the lease; for the express covenants of a lessee will, during the term, remain obligatory upon him and his personal representatives, even for breaches which have occurred after an assignment and acceptance of rent by the lessor;⁴ but with respect to

¹ *Haydon v. Haydon*, 1 Salk. 392; *Holmes v. Mentze*, 5 Nev. & M. 563.

² *Sparrow v. Bristol*, 1 Marsh. 10.

³ *Auriol v. Mills*, 4 T. R. 98; *Holford v. Hatch*, 1 Doug. 184; *Scheever v. Stanley*, 2 Rawle, 276; *Bank of Penn. v. Wise*, 3 Watts, 394; *Thomas v. Connell*, 5 Pa. St. 13.

⁴ *Thursby v. Plant*, 1 Saund. 240; *Brett v. Cumberland*, Cro. Jac. 521; *Garner v. Byard*, 23 Ga. 289; *Shaw v. Partridge*, 17 Vt. 628; *Baily v.*

covenants in law, the privity of estate to which such covenants attach ceases to exist, after an assignment of the term, and therefore no action lies against the assignor.¹

§ 437. Takes with Assignor's Rights and Obligations. — An assignee takes all the interest of the assignor in the thing assigned, whether in possession or expectancy ; but he takes it subject to all equities to which the original party is subject, and must therefore perform all covenants which are annexed to the estate so long as he is in possession.² For when a covenant relates to, or is to operate upon, a thing in being, parcel of the demise, the thing to be done by force of the covenant forms part of the demise, and goes with the land, binding the assignee to performance, though not named ; and the assignee, by accepting possession of the land, subjects himself to all such covenants.³ Thus, where a lessee was trustee for others, and transferred to them all his interest in the lease,

Wells, 8 Wisc. 541; Snyder *v.* Middleton, 4 Phila. 343; Wiley's Estate, 12 *id.* 152; Walton *v.* Cronly, 14 Wend. 63; Auriol *v.* Mills, 4 T. R. 94; Port *v.* Jackson, 17 Johns. 239; Kunckle *v.* Wynick, 1 Dall. 305; Moale *v.* Tyson, 2 Har. & McH. 387 ; Barhydt *v.* Burgess, 46 Iowa, 476; Harris *v.* Heackman, 62 *id.* 411. Thus, one of two lessees, tenants in common, on receiving an assignment from his co-tenant, becomes liable for the whole rent by privity of estate. Dwight *v.* Mudge, 12 Gray, 83. The lessee, under express covenants to pay rent and perform the covenants in the lease, is liable during the whole term, notwithstanding assignments. Staines *v.* Morris, 1 Ves. & B. 9. So he is liable upon his covenant to pay taxes. Mason *v.* Smith, 131 Mass. 510. A lessee cannot plead to an action on a covenant for rent an assignment and tender by the assignee. Orgill *v.* Kemshead, 4 Taunt. 642

¹ Bacheloure *v.* Gage, Cro. Car. 188; Enys *v.* Donnithorne, 2 Burr. 1190 ; Gordon *v.* George, 12 Ind. 408.

² Willison *v.* Watkins, 3 Pet. 50 ; Potts *v.* Del. W. Pow. Co., 9 N. J. 592 ; Wills *v.* Dryden, 52 Mo. 319 ; McMurphy *v.* Minot, 4 N. H. 51 ; Sutliff *v.* Atwood, 15 Ohio, 186; Cox *v.* Fenwick, 4 Bibb, 538; State *v.* Martin, 14 Lea, 92. Equitable as well as legal interests pass by an assignment. Thus, where the lessor's covenant to pay for improvement did not run at law, because assigns were not named therein, held, nevertheless, that the assignee could sue thereon in the assignor's name. Thompson *v.* Rose, 8 Cow. 266.

³ Van Rensselaer *v.* Bonesteel, 24 Barb. 365; Blake *v.* Sanderson, 1 Gray, 333; Prettyman *v.* Walston, 34 Ill. 175, 190; Martineau *v.* Steele, 14 Wisc. 272.

they were held liable for the performance of his covenant.¹ We have seen that the liability of an assignee does not extend to mere personal or collateral covenants; but if the covenant concerns a thing not *in esse* at the time of the demise, and is to be done upon the land, the assignee will be bound, if named, because he is to receive the benefit of it.² Among the covenants to which the liability of an assignee extends, are the covenants to repair, pay rent, taxes, or assessments, if such was the obligation of the lessee; to permit the lessor to have free passage through the house to certain portions of it which have been excepted in the lease; to cultivate the lands in a particular manner; to supply the premises with a sufficient quantity of water; or not to carry on particular trades.³

§ 438. Lessee cannot avoid his Obligations by Assigning. — A lessee may assign his rights and interest in the premises, but does not thereby discharge himself of his *express* obligations.⁴ The same rule holds with regard to an assignment of

¹ *Van Schaick v. Third Av. R. R.* 49 Barb. 409.

² *Norman v. Wells*, 17 Wend. 136; *Dunbar v. Jumper*, 2 Yeates, 74; *Taylor v. Owen*, 2 Blackf. 301; *Plymouth v. Carver*, 16 Pick. 183; *Spencer's Case*, 5 Co. 16; *Tallman v. Coffin*, 4 N. Y. 134; *Fisher v. Lewis*, 1 Clark, Pa. 22.

³ *Norton v. Vultee*, 1 Hall, 384; *Jacques v. Short*, 20 Barb. 269; *Allen v. Culver*, 3 Den. 284; *Verplanck v. Wright*, 23 Wend. 506; *Post v. Kearney*, 2 N. Y. 394; *Harley v. King*, 5 Tyr. 692; *Philpot v. Hoare*, 2 Atk. 219; *Graves v. Porter*, 11 Barb. 592; *Jourdain v. Wilson*, 4 B. & A. 266; *Cockson v. Cock*, Cro. Jac. 125; *Bally v. Wells*, 3 Wils. 32. Assignee of an undivided two thirds interest of a term, in possession of the entire premises, is liable for the whole rent. *Damainville v. Mann*, 32 N. Y. 197. A covenant tending to the support and maintenance of the thing demised is annexed to and passes with the reversion. *Sampson v. Easterby*, 9 B. & C. 505; and see *ante*, § 262. A conveyance of premises to which a demised water privilege is appurtenant is sufficient to charge the grantee with rent, as assignee of the lease of the privilege. *Provost v. Calder*, 2 Wend. 517. As to covenants running with the land, see *ante*, § 260.

⁴ If the same holds true of a lease in fee or one with perpetual renewal, *Smith v. Harrison*, 42 Ohio St. 180, it will be otherwise where the rate of rent is to be fixed at certain periods without the assent of the lessee. *Worthington v. McCann*, 19 Ohio St. 66.

part of the estate, the lessee being still liable on his covenant to pay the entire rent; for he cannot, by his own act, apportion it.¹ Nor can a lessee discharge himself from the *implied* covenants by an assignment, without the consent of the lessor; since the original privity of estate existing between them cannot be destroyed without the landlord's concurrence; but an assent may be inferred from the lessor's receiving rent from the assignee, or recognizing him in some other way as his tenant.² And as the assignment of a lessee by his own act will not discharge him from his express covenant, so neither will an assignment by the act of the law; and, therefore, if the lease be taken from him, and sold under a judgment and execution against him, he still remains liable upon all his express covenants.³

§ 439. Assignee of Reversion Succeeds to Landlord's Rights.

— It is a well-established rule of law also, that no person can take advantage of a covenant or condition, except he be a party or privy thereto; consequently, the assignee of the reversion could at common law neither sue nor be sued upon covenants contained in a demise, whether such demise were for life or

¹ *Broom v. Hore*, Cro. El. 633; *Wadham v. Marlowe*, 8 East, 314, n.; *Buckland v. Hall*, 8 Ves. 92; *Staines v. Morris*, 1 Ves. & B. 11; *Van Rensselaer v. Chadwick*, 24 Barb. 333; *Same v. Gifford*, *id.* 349. Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent of the current quarter cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn v. Calow*, 1 Mann. & G. 589.

² *Wadham v. Marlow*, 8 East, 316; *Marsh v. Brace*, Cro. Jac. 334; *Thursby v. Plant*, 1 Saund. 240, n. 5; *Shine v. Dillon*, 1 Ir. R. C. L. 277, where debt for use and occupation was held to lie against a lessee who had assigned without lessor's assent, because the holding still continued. If a lessee underlets a portion of the demised premises, and the under-tenant is recognized as such, and rent demanded of him by the lessor, the lessee and subtenant are not jointly liable to the lessor for the rent of the whole premises. *Fifty Assoc. v. Howland*, 5 Cush. 214.

³ *Hornby v. Houlditch*, Andrews, 40; *Auriol v. Mills*, 4 T. R. 99. An action will lie on a covenant in a deed against the executors of the tenant, notwithstanding he may have assigned during his lifetime, and the rent may have accrued subsequent to his death. *Brett v. Cumberland*, Cro. Jac. 522; *Coghill v. Freelove*, 3 Mod. 326.

for years. This right was reserved to the grantor and his heirs, who alone might take advantage of a condition broken; the assignee of the reversion being considered a mere stranger for such purposes.¹ The principle seems to have followed as a necessary consequence of that provision of feudal law which prevented a lord from transferring his seigniory without the consent of his vassal. This consent was expressed by what was called *attorning*, or professing to become the tenant of the new lord.² The doctrine was applicable to all leases, whether for life or for years; and if a man purchased an estate with a lease outstanding upon it, and the lessee refused to attorn to the purchaser, or to become his tenant, the grant or contract was void, or at least incomplete.³ But as experience afterwards showed that property best answers the purposes of civil life when its transfer and circulation are entirely free, this restraint upon alienation was gradually taken off by several English statutes, and more particularly by the statute of 32 Hen. VIII. c. 34, which enabled assignees of the reversion to take advantage of such covenants and conditions, and gave the tenant the like remedies against an assignee that he would have had against an assignor. By it the privity of contract, together with the privity of estate, were transferred to the assignee of the reversion; who then stood, with regard to a tenant, in the same plight that the lessor did before he parted with the reversion.⁴

¹ Co. Lit. 215, a; Milnes *v.* Branch, 5 M. & S. 411.

² An attornment made to a stranger is void: Payne *v.* Vandever, 17 Ky. 14; Leach *v.* Koenig, 55 Mo. 451; and entitles the lessor to summary process for recovery of the premises: McCartny *v.* Auer, 50 *id.* 395. In Louisiana, it forfeits the lease. Richardson *v.* Scott, 6 La. 54. See *ante*, § 180.

³ Anon., Moore, 11, pl. 42; Adams *v.* Curwen, *id.* 875, pl. 1224.

⁴ Scalstock *v.* Heuston, 1 L. R. C. P. Div. 106; Stockb. Ir. Co. *v.* Cone Ir. Works, 102 Mass. 80; and cases cited *ante*, §§ 260, 295, and *post*, §§ 440, 441, and notes. This statute is in force in New York; New Hampshire: Mussey *v.* Holt, 4 Fost. 248; Maryland: Funk *v.* Kincaid, 5 Md. 404; New Jersey: Rev. Stat. 643; Missouri: Rev. Stat. 32, § 11; Pennsylvania: 3 Binn. 625; Alabama: English *v.* Key, 39 Ala. 113; North Carolina: Kornegay *v.* Collier, 65 N. C. 69; Massachusetts: Patten *v.* Deshon, 1 Gray, 325; Pfaff *v.* Golden, 126 *id.* 402; Illinois: Fisher *v.* Deering, 60 Ill. 124; but see Raymond *v.* Kerker, 2 Bradw. (Ill.) 496. In Fisher *v.*

§ 440. Rule formerly Limited, but now Absolute. — But the statute only applied to leases for years created by deed,¹ and not to demises in fee, nor did it aid the recovery of rent therein reserved, for in such cases there was no reversion to which the right might attach; and did not include rent when severed from the reversion.² At common law, it is said the assignee might sue on the lessee's covenants in law,³ and the assignee of a rent might always have an action of debt for arrears thereof.⁴ It was even held that he might have an action of covenant; but this does not seem to be the common-law doctrine, although maintained in some States.⁵ But now a con-

Deering it is said that the statute transferred only privity of estate, and gave debt. This is clearly an error. The assignee already had these, and the statute gave him all the lessor's remedies in addition. *Post*, § 440, and notes. But the act is not in force in Ohio, Connecticut, or South Carolina. The assignee of an assignee has the benefit of the statute. *Horndige v. Wilson*, 11 Ad. & E. 645; *Fryer v. Coombs*, *id.* 403; *Campbell v. Lewis*, 3 B. & A. 392. It is held that an assignment by the lessee of his right, title, and interest in the lease, made after the lessor's assignment with the assent of the assignee of the reversion, does not exempt the lessee from his original covenant to pay rent. *Way v. Reed*, 6 Allen, 364; *Pfaff v. Golden*, 126 Mass. 402.

¹ *Standen v. Chrismas*, 10 Q. B. 135; *Bickford v. Parson*, 5 C. B. 920; *Elliott v. Johnson*, 8 B. & S. 38; *Smith v. Egginton*, L. R. 9 C. P. 145.

² *Co. Lit.* 215, a.

³ *Willard v. Tillman*, 2 Hill, 274; *Vyvyan v. Arthur*, 1 B. & C. 410; *Harrison v. Steele*, 4 H. & McH. 218. Even after he has assigned the term. *Moale v. Tyson*, 2 *id.* 387.

⁴ *Ards v. Watkin*, Cro. El. 637, 651; *Newcomb v. Harvey*, Carth. 161; *Allen v. Bryan*, 5 B. & C. 512; *Clarke v. Coughlan*, 3 Ir. L. 427; *Williams v. Hayward*, 1 Ellis & E. 1040; *Howland v. Coffin*, 12 Pick. 125; *Patten v. Deshon*, 1 Gray, 326; *Watson v. Hunkins*, 13 Iowa, 547. Hence, after a lease for five years, a second lease for ten, including the period of the first, transfers a right to the rent of that first lease. *Harmon v. Flanagan*, 123 Mass. 288.

⁵ In *Baldwin v. Walker*, 21 Conn. 168, 181, it is admitted that debt and not covenant lay at common law; though the local law of Connecticut was otherwise. In *Hunt v. Thompson*, 2 Allen, 341, Metcalf, J., says, the privity of contract is transferred; and in *Willard v. Tillman*, 2 Hill, 274, it was thought by Bronson, J., to be settled in New York that covenant lay, though he doubted the correctness of the doctrine. But *Demarest v. Willard*, 8 Cow. 206, to which he referred, merely held that the reversioner could not maintain an action of covenant for instalments ac-

veyance of leased premises, without reservation, carries with it all the grantor's rights in the lease, including the right to possession upon a forfeiture for the breach of any of its conditions, and excepts only such obligations as are merely collateral thereto, or of a personal character.¹

§ 441. Assignee of Reversion on Parol Leases, Rights of. — But the benefit and obligation of the agreements in leases not under seal may also pass to and bind parties succeeding to the lessor's interest therein, whether by act of law, as heirs, executors, &c., or by act of the lessor, as assignees, grantees, or devisees. This right has been given in some States by the broad terms of the statutes re-enacting the statute 32 Hen. VIII., and conferring on the owners of any "demised lands, tenements, rents, or other hereditaments, or persons holding derivative title from the lessor of any demise," "the same remedies by entry, action, distress, or otherwise," as the lessor or grantor possessed; and, on the other hand, enabling the lessee or his assignees to enforce all the lessor's obligations relating to the demised premises against all who succeed to his title.² But it seems also clear that a parol or crusing after he had assigned the rent. There seems, therefore, but little authority for the doctrine when the rent is on a lease for years. But where the lease is in fee, such an action has been maintained. *Streaper v. Fisher*, 1 Rawle, 155; *St. Mary's Ch. v. Miles*, 1 Whart. 229; and in New York, in *Van Rensselaer v. Read*, 26 N. Y. 558. But these cases, which can only go on the ground that the lessee's covenant runs with the rent as an incorporeal hereditament, have been examined *ante*, note 5 to § 261.

¹ *Page v. Esty*, 54 Me. 319; *Hatfield v. Lockwood*, 18 Iowa, 296; *Haywood v. O'Brien*, 52 *id.* 537; *Lufkin v. Wilson*, 57 *id.* 28; *Dolph v. White*, 12 N. Y. 296; *Fanning v. Volker*, 40 Mo. 129. Thus a landlord assigning the reversion with an agreement that he is to receive certain portions of rent thereafter payable, cannot enforce such payment or avail himself of a lien on the property created by the lease. *Hansen v. Prince*, 45 Mich. 519.

² 1 N. Y. R. S. 747, c. 23-25. The provisions of this statute, it is said in *Norman v. Wells*, 17 Wend. 136, are, in substance, a transcript of 32 Hen. VIII. c. 34, and do not extend to collateral covenants, but only to covenants touching or concerning the thing demised. And in *Harbeck v. Sylvester*, 13 Wend. 608, it was decided that the remedies of a grantee of demised premises are confined to remedies upon the lease; but see *Allen v. Culver*, 3 Den. 284. Nor does the statute apply to an assignment of

written demise may be so far confirmed by payment of rent or otherwise as to enure by way of estoppel or adoption as to all the remedies it contained;¹ especially where the validity of the transfer of contracts without the consent of the other contracting party is recognized.² Under the provisions of the statute above referred to, it has been held in New York that the assignee or devisee of the lessor in fee, though the rent was a rent charge only, could enforce its payment by all the remedies under the lease which the lessor himself could have employed.³

§ 442. Tenant to have Notice of Assignment.—Arrears of Rent.—Nor were the interests of the tenant disregarded in the passage of these acts of the legislature, for they expressly declare he shall not be prejudiced by the payment of any rent to the old landlord before he received notice of the change of interest; and the effect of the statute has been to substitute for an attornment the necessity of giving notice to the tenant, before he can be sued by an assignee for rent accruing after the assignment.⁴ After an attornment, or its rent in arrear without a transfer of the lease or land. *Slocum v. Clark*, 2 Hill, 475. Under this statute the grantee of the reversion can only take advantage of such covenants as run with the land. *Dolph v. White*, *supra*. Where a lessor who has taken the lessee's notes to secure the payment of rent grants the land absolutely, the title to the notes as well as to the land passes, unless they have been parted with by the lessor, who will then be personally liable for the amount. *Beebe v. Coleman*, 8 Paige, 392.

¹ *Rennie v. Robinson*, 1 Bing. 147; *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Smith v. Eggington*, 9 *id.* 145.

² *Perrin v. Lepper*, 34 Mich. 292. Attornment appears never to have been necessary in Michigan. The same seems to be true in Massachusetts. *Farley v. Thompson*, 15 Mass. 18, 26, *per Wilde, J.*

³ *Van Rensselaer v. Hays*, 19 N. Y. 68. This case has been already stated substantially. See *ante*, §§ 260, 285, 295. It was contended here that a rent so reserved was in gross, and for want of a reversion would not pass to the devisee. But the court held that the privity passed by force of this statute, in like manner as in a lease for years, privity of contract would have passed by the Act 32, Hen. VIII., and that the right of action passed at common law. And see *Van Rensselaer v. Read*, 26 N. Y. 558; *Lyon v. Adde*, 63 Barb. 89.

⁴ *O'Connor v. Kelley*, 41 Cal. 432.

equivalent notice, the tenant will continue to hold, upon the same terms that he held under his former landlord,¹ the instrument of attornment being in fact equivalent to an agreement for a new tenancy.² But where a man attorns as tenant to another, he is not thereby estopped from disputing the title; for he may, by mistake, have attorned to a person who has no title.³ The necessity of a formal attornment, in order to complete a grant of the reversion, was finally abolished by the statute of 4 Anne, c. 16, § 9, which has been generally adopted throughout the United States, so that an assignment by the landlord is now valid without the ceremony of an attornment.⁴ The title of a grantee of the reversion being complete without an attornment of the tenant, he will be entitled to all arrears of rent that accrue after the execution of the conveyance, and not paid to the grantor by the tenant, in default of notice.⁵ But the pay-

¹ Per Holroyd, J., in *Cornish v. Searell*, 8 B. & C. 471-476. But a tenant is liable to the assignee on his covenant to repair, without notice. The principle of Mallory's Case, 5 Co. 113, b, has no application to this covenant. *Scalstock v. Heuston*, 1 L. R. C. P. Div. 106.

² *Doe v. Boulter*, 6 Ad. & E. 675; *Doe v. Smith*, 8 *id.* 255; *Cornish v. Searell*, *supra*; *Peckham v. Leary*, 6 Duer, 494; *Scheidt v. Belz*, 4 Bradw. (Ill.) 431. In *Austin v. Ahearne*, 60 N. Y. 6, it is strenuously contended that an attornment is a recognition of the existing title, and not a new tenancy. And it is hence concluded that thereby a title to all rent in arrear passes to the assignee, and it is even maintained, though *obiter*, that this applies on an attornment by a mortgagor's tenant to the mortgagee. But this is clearly otherwise.

³ *Gravenor v. Woodhouse*, 1 Bing. 38; *Gregory v. Doidge*, 3 *id.* 474.

⁴ *Burden v. Thayer*, 3 Met. 76; *Baldwin v. Walker*, 21 Conn. 168; *Tilford v. Fleming*, 64 Pa. St. 300; *Mortimer v. O'Reagan*, 10 Phila. 500; *Coker v. Pearsall*, 6 Ala. 542; *Kellum v. Berks. Life Ins. Co.*, 101 Ind. 455. But not in Illinois. *Fisher v. Deering*, 60 Ill. 24. The rule established by St. 4 Anne, c. 16, § 9, seems, however, to have been in force in Massachusetts and Michigan, independently of that statute. *Farley v. Thompson*, 15 Mass. 26; *Perrin v. Lepper*, 34 Mich. 292; *Hansen v. Prince*, 45 *id.* 519.

⁵ *Birch v. Wright*, 1 T. R. 378; *Ruckman v. Astor*, 3 Edw. 373; 1 R. S. 739; *Gibbs v. Ross*, 2 T. R. 437; *Breeding v. Taylor*, 13 Ky. 481; *Townsend v. Isenberger*, 45 Iowa, 670; *Carson v. Crigler*, 9 Bradw. (Ill.) 83. So where the lessor's interest is sold on execution: *Ferguson v. Hardy*, 59 Ga. 758; or under decree of partition: *Stevenson v. Hancock*, 72 Mo.

ment of rent to a grantor by his tenant, before notice of the grant, is binding upon the grantee; nor will the tenant be liable to the grantee for any other breach of the condition of the demise until after he shall have had notice of the grant.¹

§ 443. Liability of, on Covenants running with the Land.—Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel *pro tanto*, and the assignee will be answerable only for his proportion of any charge upon the land which was a common burden upon the whole; and will be exclusively liable for the breach of any covenant which related to that part alone.² The statute extends to the assignee of part of the reversion in all the land;³ and if

612; *Winfrey v. Work*, 75 *id.* 55; or under chancery decree: *Hand v. Liles*, 56 Ala. 143. And the purchaser's rights exist as against the assignee of the tenant's obligation. *Tubb v. Fort*, 58 *id.* 277.

¹ *Co. Lit.* 215, b; *Sweetman v. Cash*, Cro. Jac. 8; *Molineaux v. Molineaux*, *id.* 145; 1 R. S. 739, § 146; *Farley v. Thompson*, 15 Mass. 26. An attornment to one having no color of title is void. *Jackson v. Delancey*, 13 Johns. 537. The tenant's taking a lease from an adverse claimant of the title is a fraudulent attornment and void. *Jackson v. Harper*, 5 Wend. 246; *Lawrence v. Brown*, 5 N. Y. 394.

² *Astor v. Miller*, 2 Paige, 68; *Stevenson v. Lambard*, 2 East, 575; *Com. Dig. Covenant*, B. 3; *Burton v. Barclay*, 7 Bing. 745. "Covenants," said Wilmot, C. J., in *Bally v. Wells*, Wilmot, 344, cited by Cowen, J., in *Norman v. Wells*, 17 Wend. 145, "which run and rest with the land lie for or against an assignee, at common law, though not named. They stick so fast to the thing on which they wait that they follow every particle of it." And see *Van Rensselaer v. Bradley*, 3 Den. 135; *Same v. Gallup*, 5 *id.* 454.

³ *Co. Lit.* 215; *Lewes v. Ridge*, Cro. El. 863; *Thursby v. Plant*, 1 Saund. 241; *Simpson v. Clayton*, 6 Scott, 469; *Twynam v. Pickard*, 2 B. & A. 105. By Mass. Pub. Stat. c. 121, § 3, every person in possession of land, whether it was originally demised in fee or for any other estate of freehold or for a term of years, shall be liable for the amount or proportion of rent due from the land in his possession, although it be only a part of what was originally demised. The assignee or grantee of the reversion may sue, though he be not named in the lease. *Kitchin v. Buckley*, T. Ray. 80.

there be a second reversioner, he may, it seems, also sue for any breach affecting the value of his interest, and each reversioner will recover damages according to the extent of the particular interest affected.¹ The apportionment is to be made among the respective parties, according to the value of the several portions held by them, if such value can be ascertained, and if not, then according to their respective interests in point of property.² A grantee of the reversion of part of the premises cannot, however, bring ejectment on a condition broken; for a condition is entire, and cannot be apportioned.³ Neither can the grantor of part of the reversion take advantage of a condition; for it is entirely destroyed by the grant,—the right of action being confined to such conditions as are incident to the reversion, or for the benefit of the estate.⁴

§ 444. Not Liable on Personal Covenants.—Duration of Liability.—An assignee of the term is chargeable, or entitled, as we have seen, by privity of estate, only upon covenants running with the land; and, therefore, if the covenant be with the lessee and his assigns, but the thing to be done is merely collateral to the land, and does not touch or concern the thing demised in any way, the assignee cannot sue or be sued.⁵ As, if the lessee covenants for himself and his assigns to build a house upon certain lands of the lessor, which form no part of the demise, or to pay a collateral sum to the lessor, or to a stranger,—it will, in neither case, bind his assignee, because it is merely collateral to, and in no manner touches or concerns the thing that was demised, or that is

¹ *Jesser v. Gifford*, 4 Burr. 2141; *Evelyn v. Raddish, Holt*, 543; *Atterson v. Stevens*, 1 Taunt. 194.

² *Van Rensselaer v. Jones*, 2 Bosw. 643. The devisees in remainder of premises out of which rent issues may maintain a joint action against the executor of the life tenant for rent collected by him, and which became due after the termination of the life estate. *Marshall v. Moseby*, 21 N. Y. 280.

³ 5 Co. 55, b; *Twynam v. Pickard*, 2 B. & A. 109.

⁴ 3 Kent, Com. 123.

⁵ *Spencer's Case*, 5 Co. 16, b; *Norman v. Wells*, 17 Wend. 136; *Elliott v. Johnson*, 8 B. & S. 38; and see *ante*, § 260.

assigned ; and, therefore, the assignee can no more be charged with it than any other stranger.¹ Neither will the assignee of a lease become chargeable with the covenant of a lessor to purchase at an appraisal such permanent improvements as should be erected by the lessee upon the premises, notwithstanding he may have gone into possession with a full knowledge of all the circumstances.² But whatever the liability of an assignee may be, it continues as long as he remains in possession, either personally or by his under-tenants ; for the possession of his tenant is his possession. Each successive occupant of the premises, other than the original lessee, is also liable for rent to the lessor, by reason of, and for the term of, his own possession,—possession being both the foundation and the boundary of such liability.³ And if the original lessee is obliged to pay the ground rent, he may recover it from the assignee in possession.⁴

§ 445. May take Advantage of certain Covenants, when.—
As an assignee is bound by covenants real annexed to the estate, he may take advantage of any such covenants as make in his favor ; except where the breach has happened before his own time.⁵ The lessor is, therefore, liable to an assignee of

¹ *Id.*; *Mayho v. Buckhurst*, Cro. Jac. 438. See § 460.

² *Coffin v. Talman*, 8 N. Y. 465; “There is no case to sustain us in holding that the covenant which provides for payment at the end of the term, for buildings erected on the demised premises, is a continuing covenant running with the land, or that the non-payment of the amount, or failure to name an appraiser in order to ascertain the amount, is a ‘continual breach,’ for which the grantees of the reversion should be liable, though it did not happen in his time. The breach happened in the time of the lessor, and he was unquestionably liable for the whole value of the building, but his assignee is not liable.” Per Johnson, J.; and see *Hite v. Parks*, 2 Tenn. Ch. 373.

³ *Carter v. Hammett*, 18 Barb. 608; s. c. 12 Barb. 253. And the fact that the sub-tenant, upon his written order, paid rent to the original landlord, does not alter the case. *Id.* An assignment of the farm may be presumed from the mere possession of a third party. *Cross v. Upson*, 17 Wisc. 618; *Mariner v. Crocker*, 18 *id.* 251. Use and occupation may be maintained against such assignee. *Sears v. Trowbridge*, 15 Gray, 184.

⁴ *Stone v. Evans*, Peake’s Add. Cases, 94.

⁵ *Martin v. Baker*, 5 Blackf. 232; *Lewes v. Ridge*, Cro. El. 863; *London v. Richmond*, 2 Vern. 423.

the lease on his covenants, for quiet enjoyment; ¹ for further assurance; ² to renew the lease; repair the premises, and the like.³ And, as a general rule, where covenants running with the land are broken after the land has come into the possession of an assignee, he only can bring an action for the damages arising therefrom; ⁴ unless the nature of the assignment to him is such that the assignor is bound to indemnify him against such breaches of covenant.⁵ For as to such covenants, even a release by the grantee or assignee will not operate as a discharge to subsequent assignees of the same land.⁶ But an assignee can only sue for breaches of covenant that occurred in his time, and not for such as were committed before the assignment, which are mere *chooses in action*, and therefore not assignable.⁷

§ 446. In order to Sue, must hold Entire Estate of the Lessor.

— Upon common-law principles, however, to entitle an assignee to sue on covenants annexed to his reversion, he must, when the cause of action accrues, have the same estate as was left in the lord on creating the tenure, if to that alone the cove-

¹ *Noke v. Awder*, Cro. El. 373; *Campbell v. Lewis*, 3 B. & A. 392; *Portmore v. Bunn*, 1 B. & C. 694. A lessee who assigns his term merely is not liable to his assignee for an eviction by one claiming under the lessor, except upon an express covenant of warranty. *Waldo v. Hall*, 14 Mass. 486.

² *King v. Jones*, 5 Taunt. 418; *Middlemore v. Goodale*, Cro. Car. 503.

³ *Vernon v. Smith*, 5 B. & A. 11; *Roe v. Hayley*, 12 East, 469; *Furnival v. Crew*, 3 Atk. 88; *Spencer's Case*, 5 Co. 16; *Van Horn v. Crain*, 1 Paige, 455; *Sutherland v. Goodnow*, 108 Ill. 528. The assignee may take advantage of the covenant of renewal although the *habendum* of the assignment merely sets out the existing term, and does not refer to the covenant. *Downing v. Jones*, 11 Daly, 245.

⁴ *Griffin v. Fairbrother*, 1 Fairf. 91.

⁵ *Bickford v. Page*, 2 Mass. 460; *Kane v. Sanger*, 14 Johns. 89.

⁶ *Abby v. Goodrich*, 3 Day, 433.

⁷ Com. Dig. Covenant (B. 3); *Shelby v. Hearne*, 6 Yerg. 512. Since the tortious destruction of buildings on demised premises, though by a stranger, is waste, for which a tenant for years or for life is liable to the reversioner, irrespective of any express agreement, assignees of a term for years may have an action on the case against a stranger for a negligent destruction of buildings on the premises. *Cook v. Champl. Tr. Co.*, 1 Den. 91.

nants were annexed ; hence, if the reversion be for years, and the assignee takes a conveyance of the fee, the estate to which the covenants were annexed being merged, the covenants are also merged in it. And if two persons are parties on the same side to a deed of demise,—for example, mortgagor and mortgagee,—of whom one (the mortgagee) has a right to lease, and the other (the mortgagor) has not, the latter may either refuse to join with the former in demising, or, by joining, admit his own want of title ; for the covenants by the lessee are with the latter only. And though the covenants are available by the mortgagor, being founded upon the condition that he has granted the lease, still they are mere independent contracts, and have no connection with the tenure to which, as it only subsists between the party demising and the covenantor, the mortgagor is a stranger ; therefore, on an assignment of the reversion they do not pass to the assignee, but remain available by the mortgagor.¹

§ 447. After Grant of Reversion, Lessor to sue only on Personal Covenants.—After the lessor has parted with his reversion, he cannot bring an action for the breach of any covenant which has occurred subsequent to his grant, except on such covenants as are collateral to and do not run with the land ; for if he might, the tenant would be liable to two actions for the same thing, one in favor of the landlord, and the other of the grantees.² But as rent reserved is in the nature of an incorporeal hereditament, it differs from the other obligations of the lessee, and rent yet to grow due may be assigned without the reversion, or retained when the reversion is assigned ;³ and an action of debt lies for arrears thereafter accruing, without the reversion ; but not an action of covenant.⁴ Rent in

¹ *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, *id.* 678; s. c. 1 H. Bl. 562.

² *Beely v. Parry*, 3 Lev. 154; *Thursby v. Plant*, 1 Saund. 241, b.

³ *Ante*, § 426; *Perrin v. Lepper*, 34 Mich. 292.

⁴ *Ante*, § 441 and note; *Ryerson v. Quackenbush*, 2 Dutch. 236. But the assignment by the lessor of the lease only, while it undoubtedly carries the right to the arrears of rent in an action of debt, if not of covenant, in the name of the assignee, has been held not to entitle such assignee

arrear is a mere *chase in action*, and not assignable so as to give an action in the name of the assignee;¹ but if not severed, rent to accrue follows the reversion as an incident into the hands of the assignee, even to a purchaser at a sheriff's sale;² nor will the promise of the lessee to pay the assignor carry any right of action.³ Payment of rent to him, however, will be good as against the assignee, until the lessee shall have had notice of the assignment; even although the rent be paid in advance.⁴

§ 448. Liability of Lessee's Assignee and Sub-tenant.— Between the lessor and an under-tenant of the original lessee, there is neither privity of estate nor of contract, so that as between these parties there can be no advantage taken of the covenants dependent upon a lease either *in law* or *in deed*; therefore, a lessor cannot sue an under-tenant, upon the lessee's covenant to pay rent.⁵ But an assignee of the lessor's interest in a lease, who has been recognized as such by the tenant, may sue in his own name for rent, although he has no interest in the reversion.⁶ A lessee who assigns can have no right of to sue on the other covenants, though running with the land. He is at most entitled to sue in the name of the assignor. *Huerstel v. Lorillard*, 6 Rob. 260; 7 *id.* 251; *Thacker v. Henderson*, 63 Barb. 271.

¹ But the terms of the assignment may be strong enough to convey right to rent already accrued. *U. S. v. Hickey*, 17 Wall. 9.

² *Bank of Penn. v. Wise*, 3 Watts, 394; *Van Wicklen v. Paulson*, 14 Barb. 654; *Townsend v. Isenberger*, 45 Iowa, 670; *Kane v. Mink*, 64 *id.* 84. But he is entitled, not from the date of the sale, but from the time of delivery of his deed. *Casey v. Woodruff*, 45 N. Y. 98.

³ *Stout v. Kean*, 3 Harringt. 82; *Sharp v. Key*, 8 M. & W. 379; *Payne v. Beal*, 4 Den. 405.

⁴ *Farley v. Thompson*, 15 Mass. 18; *Stone v. Patterson*, 19 Pick. 476. But *De Nicolls v. Saunders*, L. R. 5 C. P. 589, *Cook v. Guerra*, 7 *id.* 132, are *contra* in the case of a mortgage.

⁵ *Quackenboss v. Clarke*, 12 Wend. 555; *Kain v. Hoxie*, 2 Hilt. 311; *ante*, § 108; *Holford v. Hatch*, Doug. 183. Nor can he maintain an action for use and occupation against the under-tenant, unless under an agreement. *Jennings v. Alexander*, 1 Hilt. 154; *Way v. Holton*, 46 Vt. 184; *Krider v. Ramsay*, 79 (N. C.) 354. And there being no privity, the sub-tenant cannot maintain an action, *ex contractu*, against the landlord for unlawful entry. *Id.*

⁶ *Moffatt v. Smith*, 4 N. Y. 126. In this case the lessor had assigned

action on any covenant in the lease against his assignee, for he has no residuary interest upon which to base his claim;¹ but he is entitled to be indemnified by the assignee against the payment of rent, and the performance of covenants in the original lease, since his liability continues although he may not be in possession.² Where, however, an assignee covenants absolutely to pay, and perform all the covenants of the lessee, it is not a mere covenant for indemnity, but he renders himself directly liable to the lessee upon every default, whether the latter has been called on for rent or not.³

§ 449. Liability of Assignee and Sub-tenant distinguished.—An assignee of a lease is liable, as we have said, only in respect of his possession; he bears the burden while he enjoys the benefit, and if the whole term of years is not passed over to him, a day only being reserved by the lessee, he is not liable to the landlord at all on such covenants; for he is then only an under-tenant, and not an assignee.⁴ As assignee, he is liable only for covenants broken while he remains possessed of the estate,⁵ and for such rents only as accrue after he took pos-

the lease, without the reversion, and the lessee paid rent to the assignee, and it was held that this created such a privity of contract between the tenant and the assignee, that the latter might sue in his own name for rent subsequently accruing under the lease.

¹ *Hicks v. Downing*, 1 Ld. Ray. 99.

² *Staines v. Morris*, 1 Ves. & B. 8; *Pember v. Mather*, 1 Bro. Ch. 52. A lessee of premises assigned his lease to persons who assigned to others, who committed breaches of covenant and then assigned over. The lessee, being afterwards sued by the lessor for such breaches and compelled to pay, was held to be entitled to recover from the assignees the amount which he had been compelled to pay to his lessor. *Moule v. Garrett*, L. R. 7 Exch. 101.

³ *Jackson v. Port*, 17 Johns. 479. But though a lessor who has accepted rent from the assignee of his lessee, can still hold the lessee on his express covenants, he cannot maintain an action for rent against him. *Fletcher v. McFarlane*, 12 Mass. 43; *Wall v. Hinds*, 4 Gray, 256.

⁴ *Farmers' Bank v. Mut. Ass. Co.*, 4 Leigh, 69; *Davis v. Morris*, 36 N. Y. 569; *Mayhew v. Hardesty*, 8 Md. 479; *Holford v. Hatch*, 1 Doug. 186, n.; *Milnes v. Branch*, 5 M. & S. 411; *Goddard v. Keate*, 1 Vern. 87; *Derby v. Taylor*, 1 East, 502; *Church v. Brown*, 15 Ves. 265.

⁵ *Armstrong v. Wheeler*, 9 Cow. 88; *Pitcher v. Tovey*, 4 Mod. 71; s. c. 3 Lev. 295; *London v. Richmond*, 2 Vern. 421; *Staines v. Morris*, 1

session.¹ Although he assigns over, he is, notwithstanding, liable for all such breaches as occurred during the time of his enjoyment, because the right of action having once vested in the lessor, for breaches committed by him as assignee, cannot be divested by a re-assignment, although the privity of estate may be destroyed between them, and a privity of contract never existed.² But he is not chargeable for a breach of covenant happening after his assignment, for the privity of estate is wanting ;³ nor, for the same reason, is he liable upon a breach which happened previous to the assignment to him.⁴ As, where a lessee covenanted to build and finish a house within a certain time, and, after that time had expired, assigned the lease,— it was held that this covenant should not bind the assignee, forasmuch as it was broken before the assignment was made to him ; though it would have been otherwise if the lessee had executed the assignment before the time specified for finishing the house had expired.⁵ It is otherwise, also, where there is a continuing breach ; as, if there be a covenant to repair within a specified time after notice ; if the lessee does not repair upon notice by the assignee, an action lies, though

Ves. & B. 11; Jackson *v.* Port, *supra*; Wright *v.* Kelly, 4 Lans. 57; Couch *v.* Tregonning, L. R. 7 Exch. 88. But he remains liable until the lessor has notice of the reassignment. Meister *v.* Birney, 24 Mich. 435.

¹ Fowler *v.* Moller, 4 Bosw. 149; Durand *v.* Curtis, 57 N. Y. 7.

² Harley *v.* King, 2 Cr., M. & R. 22; Onslow *v.* Corrie, 2 Madd. 330; Valliant *v.* Dodemedé, 2 Atk. 546; Treacle *v.* Coke, 1 Vern. 165. But see Hintze *v.* Thomas, 7 Md. 346.

³ Barnfather *v.* Jordan, Doug. 452; Co. Lit. 3, a, 356, a; Young *v.* Peyser, 3 Bosw. 308.

⁴ Day *v.* Swackhamer, 2 Hilt. 4; Tillotson *v.* Boyd, 4 Sandf. 516. Not after he has ceased to enjoy any benefit of the estate. Astor *v.* L'Amoreux, 4 Sandf. 524; Carter *v.* Hammett, 18 Barb. 608; McIntyre *v.* Scott, 8 Johns. 169.

⁵ St. Saviour *v.* Smith, 3 Burr. 1271; Grescott *v.* Green, 1 Salk. 199; Tillotson *v.* Boyd, 4 Sandf. 516. The assignee of a lease not assignable without the consent of the lessor, who takes with such consent, and assumes the covenants therein contained on the part of his assignor, is not liable for the prior breach of a covenant to build. The representatives of the lessor, having consented to the assignment without any objection that the covenant had not been performed, are estopped from alleging that the covenant had not been satisfactorily performed. Townsend *v.* Scholey, 42 N. Y. 18.

it was out of repair before the assignment.¹ Although an eviction out of part of the estate will discharge a lessee from the payment of any rent, the case is different with an assignee; for if he is turned out of possession of part of the premises, he must pay rent for so much of it as he retains, being liable upon his contract in respect of the land.²

§ 450. Liable without Actual Entry.—An actual entry upon the demised premises by an assignee is not requisite, in order to charge him with the performance of covenants running with the land; for by accepting an interest under the conveyance, he incurs the responsibility connected with the estate, to the same extent, as if he had taken possession in fact.³ The same rule applies to the assignee of an assignee; and whether the second assignee enters upon the premises or not is unimportant; for by the assignment, the title and possessory right pass, and the assignee becomes sufficiently possessed to discharge the prior assignee from the burden of the covenants, and to render him liable for all breaches of covenant happening after the assignment to him.⁴ But a lessor cannot maintain an action of covenant for arrears of rent, against a party occupying demised premises, charging him as assignee, when in fact he never had an assignment of the lease.⁵ Possession, however, by the defendant, is sufficient

¹ Com. Dig. tit. Covenant (B).

² Stevenson *v.* Lambard, 2 East, 575.

³ Walton *v.* Cronly, 14 Wend. 63; Bedford *v.* Terhune, 30 N. Y. 453; Astor *v.* Lent, 6 Bosw. 612; Walker *v.* Reeves, Dougl. 461, n.; Cook *v.* Harris, 1 Ld. Ray. 367; Odell *v.* Wake, *supra*; Williams *v.* Bosanquet, 1 Br. & B. 238; Gretton *v.* Diggles, 4 Taunt. 766; Babcock *v.* Scovill, 56 Ill. 461; Simonds *v.* Turner, 120 Mass. 328.

⁴ Walker *v.* Reeves, *supra*; Taylor *v.* Shum, 1 B. & P. 21. If only an undivided interest in the term is assigned, the assignee becomes liable for the entire rent if he takes possession of the whole of the premises. Domainville *v.* Mann, 32 N. Y. 197.

⁵ Quackenboss *v.* Clark, 12 Wend. 555. And the question whether he holds by assignment is one of fact, although he is in possession, pays rent, and sublets. Welsh *v.* Schuyler, 6 Daly, 442. A deposit of a lease by way of equitable mortgage does not render the depositary liable for the rent and covenants. Moores *v.* Choat, 8 Sim. 508; *ante*, § 406. An agreement to take an assignment of a lease, followed by possession of the

evidence, *prima facie*, to charge him as assignee for the non-payment of subsequently accruing rent; yet he may prove that he is not assignee, and thus rebut the presumption which arises from occupation.¹

§ 451. Assignments by Deed, and in Law.—Their Effects distinguished.—When the assignment is by deed, an assignee becomes liable as such by merely accepting the deed; but if a man becomes assignee only by operation of law, he is not, in general, chargeable until he actually enters, or does some other act showing his acceptance of the lease.² But if a testator dies in possession of a term of years, it vests in the executor; and, although it be worth nothing, he cannot waive it, for he must renounce the executorship *in toto* or not at all.³ This, however, applies only where the executor has assets, for he may relinquish the lease if the property of the testator be insufficient to pay the rent; and, in case there are assets which are sufficient to bear the loss for some years, but not during the whole term, he is bound to continue tenant until the fund is exhausted, and then, upon giving notice to the lessor, he may waive the possession.⁴

equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee on the covenants in the lease. *Cox v. Bishop*, 8 De Gex, M. & G. 815.

¹ *Williams v. Woodard*, 2 Wend. 487; *Acker v. Witherell*, 4 Hill, 112. An assignee may always rebut the presumption arising from his occupation, and prove that he refused to accept the lease under the assignment, as where the assignment was for the benefit of creditors, which did not specifically mention the lease. *Bagley v. Freeman*, 1 Hilt. 196; and see *post*, §§ 458, 459. So *Kain v. Hoxie*, 2 Hilt. 311; *Cross v. Upson*, 17 Wisc. 618; *Mariner v. Crocker*, 18 *id.* 251. In *Theological Inst. v. Barbour*, 4 Gray, 329, two were lessees at will, and a sale by lessor determined the will; both were thereafter in possession, but it was held that one might show he was tenant to the other, and so not liable to lessor.

² *Salmon v. Smith*, 1 Saund. 203, b; *Williams v. Bosanquet*, 1 Br. & B. 238.

³ *Rubery v. Stevens*, 4 B. & A. 241; *Hornidge v. Wilson*, 11 Ad. & E. 645; *Wollaston v. Hakewill*, 3 Scott, N. R. 613.

⁴ *Woodfall's Landl. & T.* 375; *Astor v. L'Amoreux*, 4 Sandf. 524.

§ 452. Assignment over, generally discharges Future Liability.

— An assignee may always discharge himself from liability for subsequent breaches, in respect to rent as well as to other covenants, by assigning over,— though it be done for the express purpose of getting rid of his responsibility, and although the second assignee neither takes possession nor receives the lease.¹ And he may assign to a beggar;² a *feme covert*;³ or to a person who is on the eve of quitting the country forever, provided the assignment shall be executed before his departure;⁴ and even although the assignee may receive from the assignor a premium, as an inducement to accept the transfer.⁵ The same result follows, notwithstanding the assignment of the lease remains in the hands of the solicitor of the assignor, who has a lien for the expense of preparing it, or the lease contains a covenant not to assign.⁶ For the assignment destroys the privity of estate, which was the only ground upon which the assignee was liable; and though the tenant's liability on his covenant to pay rent may subsist during the continuance of the lease, there is no personal confidence reposed in the assignee of the lessee.

§ 453. Assignment over, Essentials to its Validity. — As an assignee is liable to the reversioner, by reason of his occupa-

¹ Armstrong *v.* Wheeler, 9 Cow. 88; Hurst *v.* Rodney, 1 Wash. 375; Keeling *v.* Morrice, 12 Mod. 371; Harley *v.* King, 1 Gale, 100; Childs *v.* Clark, 3 Barb. Ch. 52; Johnston *v.* Bates, 48 N. Y. S. C. 180; Patten *v.* Deshon, 1 Gray, 325; Williams *v.* Earle, 9 B. & S. 740. Although the continued possession of the premises by the assignee of a lease after he has assigned the same may be evidence of fraud and tend to show that his assignment was merely colorable, yet that fact standing alone is not sufficient to establish the invalidity of the assignment. Tate *v.* McCormick, 23 Hun, 218. But it is held, in Williams *v.* Earle, *supra*, that though the assignee is relieved from liability for subsequent breaches of covenant, he is still liable for assigning to a person of known irresponsibility.

² Valliant *v.* Dodemedé, 2 Atk. 546; Taylor *v.* Shum, 1 B. & P. 21.

³ Barnfather *v.* Jordan, Doug. 452; Co. Lit. 3, a.

⁴ Onslow *v.* Corrie, 2 Madd. 330.

⁵ Valliant *v.* Dodemedé, *supra*; Johnson *v.* Sherman, 15 Cal. 287.

⁶ Odell *v.* Wake, 3 Camp. 394; Thursby *v.* Plant, 1 Saund. 241, c; Paul *v.* Nurse, 8 B. & C. 486.

tion only, and not by virtue of any privity of contract, it is not necessary for him to show that he has divested himself of the paper title, or legal right; it is enough that he is not in possession during the time for which rent is claimed.¹ But an assignment to a nonentity, or person not in existence, possession remaining unchanged, will be unavailable.² And, to divest himself of all responsibility, an assignee must assign all his estate, otherwise he will be liable *pro tanto*; for covenants running with the land are, as we have seen, divisible, and he would, therefore, remain liable on a covenant to repair, or to pay rent, as to that part of the premises of which he retains possession.³ Nor can the plaintiff reply fraud in the assignment, unless he can show a trust. And it has been doubted whether there ever could be such a thing as a fraudulent assignment, and whether an issue on such a point could ever be well taken,—the defendants having at all times, a right to divest themselves of their interest, by the mere form of an assignment, which drives the plaintiff to take possession.⁴

§ 454. Liability of, on certain Covenants.—Where the lessee assigned his interest in demised premises, by an indenture executed by both parties, “subject to the payment of rent, and the performance of the covenants and agreements reserved and contained in the original lease,” the assignee took possession, occupied the premises, and before the expiration of the term, assigned to a third person, and after the first assignment the lessee was obliged to pay to the lessor

¹ *Astor v. L'Amoreux*, 4 Sandf. 524; *Carter v. Hammett*, 18 Barb. 608; *Taylor v. Shum*, 1 B. & P. 23.

² *Taylor v. Shum*, *supra*.

³ *Congham v. King*, Cro. Car. 221. A general release of the lessee, after an assignment, does discharge an assignee's liability for use and occupation. *McKeon v. Whitney*, 3 Den. 452. If an assignee of a lease, who has not covenanted to pay rent, assigns over and takes an agreement from his assignee to pay rent to him, the agreement is without consideration and void. *Stoppani v. Richard*, 1 Hilt. 509.

⁴ Per Eldon, Ld. Ch., and see 1 Bull. N. P. 154; *Pitcher v. Tovey*, 4 Mod. 71; s. c. 12 *id.* 23; *Chancellor v. Poole*, Doug. 764; *Taylor v. Shum*, *supra*; *Cook v. Harris*, 1 Ld. Ray. 367; but see *Williams v. Earle*, *supra*.

rent which the assignee had suffered to be in arrear,— it was held that the lessee could not maintain an action of covenant against the assignee in respect to such breach, the words “subject to the payment of rent,” &c., being words of qualification, and not of contract.¹ So, where upon a lease for years the lessee covenants for himself and his assigns to pay the rent so long as he and they shall have possession of the thing let, and the lessee assigns, and the time expires, and the assignee continues in possession afterwards,— an action of covenant will lie against him for rent in arrear, after the expiration of the term; for though he is not an assignee strictly, according to the rules of law, yet he will be accounted such an assignee as will render him liable to perform the covenants.² And there is no difference with respect to the executor or administrator of a lessee for years, for they may, like any other assignee, assign the term, and divest themselves of all liability upon the privity of estate, but not upon the privity of contract; and so, it will be seen, may the assignees of a bankrupt lessee.³

§ 455. Mortgagee generally considered an Assignee.—In New York it is held that the mortgagee of a term, who has never taken possession under the mortgage, is not an assignee of the whole term or liable for rent, since he has not all the estate, right, title, and interest of the mortgagor; the mortgage being but a security for the debt, and the legal estate remaining in the mortgagor.⁴ And, therefore, where a contractor

¹ *Wolveridge v. Steward*, 3 Moore & S. 561; *Moule v. Garrett*, L. R. 7 Exch. 101. In *Farrington v. Kimball*, 126 Mass. 313, it was held, in an elaborate opinion, that the lessee stands to the lessor in the relation of a surety for the payment of the rent by the lessee’s assignee, and consequently, that he cannot maintain an action against such assignee for the rent reserved until he has paid it himself.

² *Bac. Abr. tit. Covenant (E. 3)*.

³ *Auriol v. Mills*, 4 T. R. 94; *Esp. N. P.* 201; *Onslow v. Corrie*, 2 Madd. 330.

⁴ *Walton v. Cronly*, 14 Wend. 63; *Astor v. Hoyt*, 5 *id.* 603; s. c. 2 *Paige*, 68. As to the respective rights of the mortgagor and mortgagee of the term, see *Stillman v. Van Beuren*, 49 N. Y. S. C. 86; *Wunderlich v. Reis*, 31 Hun, 1; *Riley v. Sexton*, 32 *id.* 245. See *McKee v. Angelrodt*,

took an assignment of a term as security for his earnings, and entered upon the premises for the purpose of making repairs, he was held not to have made himself thereby liable for rent.¹ In England, however, and in those States where the common-law doctrine of mortgage exists, a contrary rule prevails; and a mortgagee, although he has had the lease assigned to him as a security merely, is held to be seised of the legal estate, and liable, as assignee, whether in possession or not.² But in all cases after a mortgagee has taken possession, he is to be deemed an assignee for all practical purposes; the principle having been held to apply even where, as mortgagee, he had obtained a fund which was awarded to the lessor for damages on taking the leasehold premises for public use.³

§ 456. Liability of Assignee of Insolvent Debtor. — An assignee of a bankrupt or insolvent debtor, who enters upon and makes use of the leased premises as part of the assigned estate, as well as the purchaser of a term of years from a sheriff under an execution, are liable, like all other assignees, upon the lessee's covenants;⁴ but not unless they take pos-

16 Mo. 283; *Polhemus v. Trainer*, 30 Cal. 685. The whole term must be assigned, to make an assignee liable. *Davis v. Morris, supra*.

¹ *Tallman v. Bresler*, 56 N. Y. 635.

² *Williams v. Bosanquet*, 1 Br. & B. 238; *Flight v. Bentley*, 7 Sim. 149. But see *Moores v. Choat*, 8 Sim. 508; *Close v. Wilberforce*, 1 Beav. 112. So in New Hampshire, *McMurphy v. Minot*, 4 N. H. 251; and in Maryland, *Abrahams v. Tappe*, 60 Md. 317; while in the U. S. courts it is left doubtful. *Calvert v. Bradley*, 16 How. 593. The assignment by an assignee of a term of years, of his interest, by way of mortgage as security for a debt, does not divest him of his estate, nor destroy the relation of landlord and tenant between him and his tenant, if the debt for which the term was mortgaged be paid or satisfied previous to the accruing of the rent. *Evertsen v. Sawyer*, 2 Wend. 507; *Engles v. McKinley*, 5 Cal. 153; *McKee v. Angelrodt*, 16 Mo. 283. Upon payment of the debt no formal reassignment of the lease is necessary, nor can the assignment, after such payment is made, be set up by the original assignee. *Despard v. Walbridge*, 15 N. Y. 374.

³ *Astor v. Hoyt*, 5 Wendell, 603; s. c. 2 Paige, 68; *State v. Martin*, 14 Lea, 93.

⁴ *Holford v. Hatch*, Doug. 184; *Carter v. Warne*, 4 C. & P. 191; *Thomas v. Pemberton*, 7 Taunt. 206.

session, assume the management of the premises, or do some other act indicating an intention to accept the term.¹ And so where a man purchased a lease at a judicial sale, under an agreement to hold it for the benefit of another who advanced the purchase-money and went into possession, the former was held not to be liable as assignee upon the covenant for the payment of rent, and that the lessor must look to the equitable owner in possession for such payment.² Nor will they, if they do not accept the term, be liable to rent in arrear, accrued subsequent to the bankruptcy, of premises which had been occupied by the bankrupt;³ the bankrupt himself remaining liable upon all his implied covenants, and for all rent becoming due after his petition;⁴ for under the bankrupt system of England, and according to the provisions of both the bankrupt laws of the United States, the discharge of a bankrupt merely had the effect of discharging him from liability for debts existing at the time of presenting his petition, leaving him liable for those which might arise in future,

¹ *Bourdillon v. Dalton*, 1 Esp. 233; *Naish v. Tatlock*, 2 H. Bl. 319; *Welch v. Myers*, 4 Camp. 368; *Clarke v. Hume, Ry. & M.* 207; *Bagley v. Freeman*, 1 Hilt. 196; *Re Yeaton*, 1 Lowell, 420; *Briggs v. Lowry*, 8 M. & W. 729; *Hoyt v. Stoddard*, 2 Allen, 442. In *Commonwealth v. Frankl. Ins. Co.*, 115 Mass. 278, the same rule was applied to receivers appointed under statute, and an amount paid by way of compromise, but applied by the lessor as rent, was held not to conclude their election. The assignee upon so accepting becomes liable for the reserved rent as it falls due while he holds the lease, and not merely for the value of the premises, or the actual period of occupation. *Morton v. Pinckney*, 8 Bosw. 135. A release of an under-tenant by the assignees does not, however, amount to an acceptance of the lease. *Hill v. Dobie*, 8 Taunt. 325. But selling the leased premises at auction, though the sale afterwards went off, and the assignees did nothing to enforce it, was held to be conclusive as an election to accept. *Hastings v. Wilson*, 1 Holt, 290. The assignee in a voluntary assignment is not chargeable for rent if he permits the assignor to remain in possession. *Detwiler's Appeal*, 96 Pa. St. 323. Nor if he uses the premises in the conduct of the business of his trust. *White v. Thomas*, 75 Mo. 454.

² *Astor v. L'Amoreux*, 4 Sandf. 524.

³ *Hendricks v. Judah*, 2 Caines, 25; *Sparhawk v. Broome*, 6 Binn. 256; *Copeland v. Stephens*, 1 B. & A. 593.

⁴ *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Stinemets v. Ainslie*, 4 Den. 573; *Large v. Bosler*, 2 Clark, Pa. 29.

even when called into being by contracts made before the delivery to him of his certificate.¹

§ 457. Insolvency as affecting Right to collect Subsequent Rents. — As a general rule, future contingent debts were not affected by a discharge in bankruptcy, although they grew out of contracts or transactions made before the discharge,—on the general principle that the creditor, not being able to come in under the assignment, should not be deprived of his remedy against his debtor.² But the rule now seems rather to depend upon the character of each particular bankrupt law enacted. When provisions are introduced to enable the creditor on the one hand to prove future and contingent claims at a valuation, and on the other to make the certificate a bar to a future suit on such claims, both the express and implied covenants of the bankrupt may be discharged, whether contained in a lease under seal or in any other instrument.³

¹ *Thompson v. Hewitt*, 6 Hill, 254; *Hall v. Fowler*, *id.* 630; *Auriol v. Mills*, 4 T. R. 94. Nor does it bar a suit to recover possession of lands or tenements wrongfully withheld from the owner. *Crosby v. Wentworth*, 7 Met. 10. In England, however, by the provisions of the bankrupt acts, 49 Geo. III. c. 121, § 19, and 6 Geo. IV. c. 16, § 75, the acceptance by the assignee of disclaimer by the bankrupt lessee within a limited time had the effect of a surrender, and discharged the lessee even as to his express covenants. By 32, 33 Vict. c. 71, § 23, the same effect was given to the mere fact of bankruptcy without disclaimer.

² *Buel v. Gordon*, 6 Johns. 126; *Mechanics' Bank v. Capron*, 15 *id.* 467. A discharge in bankruptcy, since it reaches all debts which were, or might have been, proved under the commission, discharges a covenant to pay off incumbrances on land before conveyed; but does not discharge personal covenants in a trust deed for uncertain future payments, intended only to protect the trust estate, as future taxes. *Murray v. De Rottenham*, *supra*. But a covenant for quiet enjoyment is discharged by a certificate of bankruptcy, though the breach happens after the petition is filed, since the claim on the covenant before breach was a contingent demand, provable under the act. *Jemison v. Blowers*, 5 Barb. 686.

³ Such is the effect of the recent English bankrupt act, 32, 33 Vict. c. 71, § 23, which terminates the lessee's express, as well as implied, obligations of bankruptcy, and allows any person injured by the operation of this section to prove therefor. But this termination of the lease is only as to the existing holder; for where the assignee became bankrupt, such surrender did not affect the lessee. *Smyth v. North*, L. R. 7 Exch. 242.

Neither the former bankrupt laws of England or of America contained provisions of this nature; but more recent enactments have enabled the creditor to come in for such a dividend, and discharged the bankrupt from all claims existing at the period of bankruptcy, whether due or to become due.¹ Independently of such a provision, the creditor would not be barred of any of his rights against the lessee for the recovery of rent accruing subsequent to a petition for a discharge, except where, in the absence of an express covenant, there has been an assignment and acceptance by the assignee. But in cases of an express covenant to pay rent, the prior discharge of the lessee as an insolvent cannot be resorted to by him as a protection against the claim of the lessor.² When, however, there is no express covenant, and the assignee accepts the lease, or when the lease is surrendered by statute, the discharge of the bankrupt is complete; and if he afterwards comes in as the assignee of his own assignee, he will incur no greater liability than any other person would do in the same character.³ And there can be no apportionment of rent, so as to make the bankrupt liable for what accrued previous to the bankruptcy.⁴ The assignee, however, may at any time relieve himself of further liability by assigning over.⁵

¹ But under such provisions in the United States bankrupt laws of 1841 and 1867, future rent was held not within their terms. *Bosler v. Kuhn*, 8 Watts & S. 183; *Savory v. Stocking*, 4 Cush. 607; and though a contrary opinion was at one time intimated as to the latter act, *Re Yeaton*, 1 Lowell, 420, 422, the same court subsequently corrected this, and sustained the former position. *Ex parte Houghton*, *id.* 554; and see *Treadwell v. Marden*, 123 Mass. 390. Under the Massachusetts insolvency law a lessor is entitled to prove against the tenant's rent estate for rent becoming payable by the terms of the lease before or after the death of the lessee, up to the time that the claim is presented to the Commissioners, but is not entitled to prove any claim for or on account of rent payable in the future. *Daniels v. Newton*, 114 Mass. 530; *Deane v. Caldwell*, 127 *id.* 242.

² *Lansing v. Prendergast*, 9 Johns. 128; *Hamilton v. Atherton*, 1 *Ashm.* 67.

³ *Doe v. Smith*, 5 Taunt. 795.

⁴ *Slack v. Sharpe*, 8 Ad. & E. 366.

⁵ *Onslow v. Corrie*, 2 Mad. 330; *Wilkins v. Fry*, 1 Mer. 265; *Ex parte Nixon*, 1 Rose, 445. And this is held even where the liability of the lessee

§ 458. **Trustees for Creditors, how far liable for Rent.** — Trustees under an assignment for the benefit of creditors have been generally held entitled to a reasonable time, to ascertain whether the leasehold property of the debtor can be made available for the benefit of the creditors or not; and that they may offer it for sale, and thus endeavor to ascertain if the lease is beneficial for the estate, without incurring any liability.¹ Undoubtedly, if they act in such a way as to render the premises of less value to the lessor, or deal with the property as if the lease were vested in them, they will by such conduct make themselves personally liable for the payment of rent and the performance of covenants.² Whether an entry and occupancy long enough to sell the debtor's goods will subject them to an action of use and occupation, seems to be hardly settled by authority. In England, and in some cases in this country, it has been held that even an extended occupancy for this purpose will not have this effect.³ But other courts, and apparently with better reason, hold any entry and occupancy, except for the mere purpose of removing the debtor's property, will render the trustees liable in this form of action;⁴ and on principle it is difficult to see why for any use of the premises for the benefit of the trust, the lessor should not be permitted to recover. And in England, the recent decisions have held that the trustees, being voluntary assignees, have no such option to accept or reject the lease as the assignees of a bankrupt have, but are bound by it immediately upon accepting the trust conveyance.⁵

is terminated by disclaimer. See *Ex parte Sneezum*, 3 L. R. Ch. Div. 463. In matter of Edwards, 10 Daly, 68, it was said that in determining whether rent shall be charged to the assignee personally or to the insolvent estate, the question is whether the assignee in retaining the occupancy acted as a prudent man would have acted in his own affairs.

¹ *Lewis v. Burr*, 8 Bosw. 140; *Journeay v. Brackley*, 1 Hilt. 447.

² *Carter v. Warne*, 4 C. & P. 191; *Turner v. Richardson*, 7 East, 335.

³ *How v. Kennett*, 2 Ad. & E. 659; *Journeay v. Brackley*, *supra*.

⁴ *Dorrance v. Jones*, 27 Ala. 630; *Horwitz v. Davis*, 16 Md. 313. See *Johnson v. Merritt*, 10 Daly, 308.

⁵ *White v. Hunt*, L. R. 6 Exch. 32; *How v. Kennett*, *supra*, overruling the *dictum* in *Carter v. Warne*, *supra*.

§ 459. Executors and Administrators.—Actions by and against, for Rent.—Executors and administrators may sue upon breaches of covenant relating to the realty, where such breaches have occurred in the lifetime of the testator, and have diminished his personal estate.¹ They may also sue on covenants in an under-lease, carved out of a leasehold interest; for wherever a person, having a term of years only, grants an under-lease, he is represented, as regards the covenants contained therein, by his executors; and whether the breaches have occurred during the lessor's life, or since his death, they are the only persons who can recover damages from the covenantor for non-performance.² Or, if a lessee demises for a longer period than his own term, his executor may maintain an action for rent accruing since his decease, upon the privity of contract, though there be no privity of estate.³ And as an executor or administrator may charge others for a debt or duty due the deceased, so will he be chargeable by them for any debt or obligation due from the deceased, and which he might have been charged with during his lifetime, so far as there are assets of the estate with which to discharge the same. The executor is, therefore, chargeable with rent in arrear, at the time of the testator's death; and if his testator had assigned the lease during his lifetime, he is chargeable with the arrearages due before the assignment, but not for those accruing after.⁴ But if the

¹ *Orme v. Broughton*, 4 Moore & S. 417; *Knights v. Quarles*, 4 Moore, 532.

² *Platt, Covenants*, 521; *Mackay v. Mackreth*, 2 Chit. 461; and see *Van Rensselaer v. Hayes*, 5 Den. 477; *Cunningham v. Baxley*, 96 Ind. 367. So the administrator of the lessee must sue lessor for an entry on the demised premises, after the lessee's death. *Smith v. Dodds*, 45 Ind. 432.

³ *Baker v. Gostling*, 1 Bing. (N. C.) 19.

⁴ *Shep. Touch.* 178, 483; *Wentworth v. Cock*, 2 P. & D. 251; *Lyddall v. Dunlap*, 1 Wils. 4; *Hyde v. Skinner*, 2 P. Wms. 196. Damages for breaches of the covenant to pay rent before and after the death of the lessee may be recovered in one action against the executor. *Greenleaf v. Allen*, 127 Mass. 248; and see *Traylor v. Cabanné*, 8 Mo. App. 131, where it was held that *assumpsit* would lie on the covenant. So damages for breach of the lessor's covenant for quiet enjoyment accruing both before and after his death. *Hovey v. Newton*, 11 Pick. 421. But the surren-

executor of a tenant from year to year omits to terminate the tenancy, and continues to occupy the premises from year to year, he is liable personally, as well as in his representative capacity, for the rent accruing during his occupancy.¹ The situation of a receiver appointed by a court is analogous to that of an executor; and he cannot be charged as the assignee of a lease, if he waives the term, the income of which is not sufficient to pay the rent.²

§ 460. Bound only by Covenants Running with the Land.— As a general rule, if a man enters into a covenant running with the land,—as, to build a house for quiet enjoyment, or the like,—and says nothing about his executors or administrators, yet are they bound to the performance of these things after his death, by reason of the privity of estate.³ But the rule is otherwise when the contract is of a nature entirely personal to the testator or intestate, or intended to be performed by himself alone, and not to bind his representatives. As, if a lessee covenants to repair, omitting other words, he is only bound to repair during his lifetime, and his executor or

der of the premises by the lessee's administrator, who has occupied them after the lessee's death, and its acceptance by the lessor without any reservation of a right to sue the administrator, or to prove against the lessee's insolvent estate, terminates all liability of the administrator or of the estate upon the covenants in the lease. *Deane v. Caldwell*, 127 Mass. 242.

¹ *Wollaston v. Hakewill*, 3 Mann. & G. 297; *Remnant v. Bremridge*, 8 Taunt. 191. An executor is considered assignee of a term demised to his testator from the time of probate, though he does not enter; but an administrator only assumes the liabilities of an assignee when he takes possession of the demised premises. *Pugsley v. Aikin*, 11 N. Y. 494. And see *Howard v. Heinerschit*, 16 Hun, 177. But remaining for several weeks on the premises, selling goods and collecting rent, until removed by a notice to quit, will subject the administrator to a personal liability for rent. *Inches v. Dickinson*, 2 Allen, 71. And where the grandson of the lessee entered and received rents from the under-tenants, he was held liable as executor *de son tort*. *Williams v. Heales*, L. R. 1 C. P. 177.

² *Martin v. Black*, 9 Paige, 641; *Copeland v. Stephens*, 1 B. & A. 593; *Wheeler v. Bramah*, 3 Camp. 340.

³ *Tremeere v. Morison*, 1 Bing. (N. C.) 89; *Reid v. Tenterden*, 4 Tyrw. 111; *Dyer*, 14; *Shep. Touch.* 178.

administrator will not be bound.¹ Or, if a lessor covenants for himself to discharge the lessee of all quit-rents, he only is bound during life. But in such cases, if the words, "during the term," are added, the executor or administrator will be chargeable so long as the term lasts.²

§ 461. May Avoid Liability by Assigning.—How Chargeable.—Although an executor or administrator may be liable to respond to the covenants of a lease, he may at any time discharge himself from individual liability, by assigning over; for, like every other assignee, he is only liable personally for breaches of covenant happening during his own time, and not for such as were committed by those who preceded him in the enjoyment of the estate. But, if he underlets, the occupation of the under-tenant is his occupation, and he becomes personally liable as assignee of the lease.³ After entry he may be charged for a breach, either in his representative character or as assignee. If declared against as assignee, he is chargeable as a tenant in actual possession, and the judgment is *de bonis propriis*. But in no case is he chargeable beyond the value of the land; and if the rent reserved be of greater value than the land, it will be apportioned, and he will be liable only for so much rent as the premises are worth.⁴ If, however, the action is brought against him as

¹ *Id.*; *Hyde v. Dean of Windsor*, Cro. El. 553; *Bally v. Wells*, 3 Wils. 29; *Coffin v. Talman*, 8 N. Y. 465. In New York, Laws, 1882, c. 410, § 652, establish a personal liability of executors in possession and control of tenement houses for damages occasioned by defective condition of stairways. See *Donahue v. Kendall*, 50 N. Y. S. C. 386.

² *Marshall v. Broadhurst*, 1 Cr. & J. 403; and see *Van Rensselaer v. Platner*, 2 Johns. Cas. 17. And as to covenants running with the land, see further, *ante*, § 260.

³ *Bull v. Sibbs*, 8 T. R. 327; *Hornidge v. Wilson*, 11 Ad. & E. 645; *Dean of Bristol v. Guyse*, 1 Saund. 112; *Carter v. Hammett*, 18 Barb. 608. It is to be understood that the estate of a testator who was a lessee remains liable for rent in due course of administration, if the landlord refuses to enter. *Martin v. Black*, *supra*; *Copeland v. Stephens*, 1 B. & A. 593.

⁴ *Matter of Galloway*, 21 Wend. 32; *Fisher v. Fisher*, 1 Bradf. 335; *Norton v. Vultee*, 1 Hall, 384; *Rubery v. Stevens*, 4 B. & Ad. 241; *Hornidge v. Wilson*, *supra*. The case of *Williams v. Bosanquet*, 1 Br. & B. 238, having established the doctrine that an assignment is complete with-

executor or administrator, the judgment will be *de bonis testatoris*, even where the breach has been committed in his own time; for it is the testator's covenant which binds the executor, and the liability exists as representing him.¹

§ 462. Heir, how far Chargeable on his Ancestor's Covenants.—The responsibility of an heir differs in some respects from that of an executor; for he is only chargeable on his ancestor's covenant, when the terms of the covenant specially provide for its performance by the heir, and assets descend to him from the covenantor to answer the claim;² unless he has actually taken possession of the land, and then he may be charged as assignee.³ He is not liable, generally, on a covenant arising merely by implication of law as on a lease, with a reservation of rent on the words *yielding* and *paying*;⁴ but if the heir of the lessor ousts the termor, he is entitled to an action against such heir, by reason of the privity of estate, upon the implied covenant of the ancestor that the lessee shall enjoy the term.⁵

§ 463. Heir of Lessee, Rights of.—The heir of a lessee can, as such, have no claim to the demised premises, unless the lease be dependent upon the life of another, and shall have been granted to the lessee and his heirs. The heir will then take as special occupant, and enjoy the same benefits and remedies as a party taking by assignment from the ancestor; the term, however, will be chargeable in his hands as assets by descent, as in case of lands in fee-simple; and he will, of

out entry by the assignee, it was held in *Wollaston v. Hakewill*, 3 Scott, N. R. 593, that the proper plea for an executor, charged as assignee, was not to traverse the assignment, but to allege that he was not otherwise assignee than by being executor, and that he had never entered.

¹ *Bull. N. P.* 159; *Buckley v. Pirk*, 1 *Salk.* 317; *Jevens v. Harridge, 1 Wms. Saund.* 1, n.

² *Gifford v. Young*, 1 *Lutw.* 287; *Shep. Touch.* 178, 363; *Co. Lit.* 374, b; *Dyke v. Sweeting*, Willes, 585; *Barber v. Fox*, 2 *Saund.* 136; *Derisley v. Custance*, 4 *T. R.* 75; *Flasket v. Beeby*, 4 *East.* 492.

³ *Derisley v. Custance*, *supra*; *Denham v. Stevenson*, 1 *Salk.* 355.

⁴ *Newton v. Osborn*, *Sty.* 387.

⁵ *Swan v. Stransham, Dyer*, 257 a.

course, be subject to the same liabilities, in respect to the tenancy, as any other person who may have taken the premises by assignment from his ancestor. So a person taking a term under the lessee will stand in the same situation, in point of right and remedy, as any other assignee; and in respect of the tenancy, he is subject to the same liabilities as other assignees. But a further consideration of the liability of an heir or devisee, for the debts and covenants of an ancestor or testator, does not properly fall within the limits of this work.

CHAPTER XI.

THE MODES OF DETERMINING A TENANCY.

§ 464. **By what Acts or Events Terminated.**— Having considered the various methods of creating a tenancy, together with the rights and obligations of the respective parties during the continuance of the tenancy, we, in the next place, proceed to show how and when it may be determined. This will be found to result, either from a lapse of the time, or a happening of the event, upon which the estate is limited,—by means of a notice to quit when the occupant of the premises holds for no definite period; by a forfeiture, merger, or surrender of the lease; by the termination of the lessor's interest in the premises; or by force of a statute in the exercise of the right of eminent domain. We propose to discuss each of these topics in its order.

SECTION I.

BY LAPSE OF TIME.

§ 465. **Determines Estate as by Operation of Law.**— Where a lease is for the life of either of the parties, or of some third person, the tenancy will expire upon the decease of him on whose life the estate depends. So upon a lease for life, or for a certain number of years, subject to be defeated by the happening of some particular event, the happening of such event will, *ipso facto*, determine the tenancy.¹ And where the lease is for a definite term of years, independent of any contingency,

¹ *Ludford v. Barber*, 1 T. R. 86; *Co. Lit.* 216; *Shep. Touch.* 187; *Roe v. Ward*, 1 H. Bl. 97. The reservation of an absolute power of revocation, in a lease of land, at the will of the lessor, is valid. *Ex parte Miller*, 2 Hill, 418.

the tenancy will, of course, expire with the term, by its own limitation, at the last moment of the anniversary of the day from which the tenant was to hold in the last year of the tenancy.¹ In all of these cases, depending upon the express conditions of the lease, no notice to quit will be necessary, in order to dissolve the relation of landlord and tenant; for both parties are apprised of their rights and duties, the lease terminates *ex vi termini* pursuant to the contract, and the lessor may at once enter upon the lessee, and resume the possession of his premises, while the latter becomes a wrong-doer if he withdraws such possession.²

SECTION II.

BY NOTICE TO QUIT.

§ 466. Tenancy at Will, Different Ways of Determining.—A tenancy at will may be terminated by the respective parties thereto, either expressly or by implication. A determination

¹ *Ackland v. Lutley*, 9 Ad. & E. 879. Where there is a proviso in the lease that upon the non-payment of rent by the lessee, the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach of the proviso. *Reid v. Parsons*, 2 Chit. 247. The lease of a farm with chattels, for a certain term, at an entire rent, reserving a power to sell the land during the term, is not terminated as to the chattels by a sale of the land. *Zule v. Zule*, 24 Wend. 76. There was a lease to the defendants, a mercantile firm, for three years, with the privilege of a renewal. During the original term, two of the partners retired. The third formed a new firm with another person, and they continued in possession of the premises, paying rent according to the conditions of the lease for the remainder of that term, and one year afterwards; it was held that such occupation did not renew or continue the original tenancy after the expiration of the term; that the old firm was not bound to make a formal surrender, and that it was for the landlord to know who occupied his premises. *James v. Pope*, 19 N. Y. 324. A lessee cannot lawfully refuse to surrender at the end of his term on the ground that there was a prior agreement under which the lessee might have held had he not taken a lease. *McCreary v. Marston*, 56 Cal. 403.

² *Cobb v. Stokes*, 8 East, 358; *Decker v. Adams*, 7 Halst. 99; *Jackson v. Bradt*, 2 Caines, 169; *Jackson v. Parkhurst*, 5 Johns. 128; *Ellis v. Paige*, 1 Pick. 43; *Bedford v. McElherron*, 2 S. & R. 49; *Clapp v. Paine*, 18 Me. 264.

of the will of the lessor was implied at common law, from his exercising any act of ownership over the property which is inconsistent with the nature of the estate; as, if he made a lease of the land to commence immediately, or entered upon the land and cut timber, made a feoffment in fee, or did any other act which amounted to an expression of his will.¹ On the other hand, a desertion of the premises by a tenant at will, or the doing of any other act inconsistent with his estate, as by assigning the land to another, or the commission of an act of waste, terminated it on the part of a tenant. The same result was produced by the death or outlawry of either party.² Most of these acts are still sufficient to terminate a strict tenancy at will.³ An express determination of a general tenancy at will is also produced by a notice to quit; which is either a positive demand for possession by the lessor, or a formal declaration by the lessee that he will hold no longer, followed by his giving up possession. If the tenancy is strictly at will, a simple demand is alone requisite.⁴ A tenancy at sufferance, however, is determined by mere entry,—no demand of possession or other notice being necessary for the purpose.⁵

¹ Co. Lit. 55, b; 57, a; *Disdale v. Iles*, 2 Lev. 88; *Ball v. Cullimore*, 2 Cr. M. & R. 120.

² 5 Co. 116; *Ellis v. Paige*, 1 Pick. 43; *Forbes v. Smiley*, 56 Me. 174; *Reed v. Reed*, 48 *id.* 388. A husband and wife were lessees of land during their natural lives, and the life of the longest liver of them, free of rent, and the defendant took possession, under a verbal agreement with them to support them and to receive the profits of the land over what should be necessary for such support; upon the death of the husband it was held that the widow was entitled to recover possession; for the defendant's interest in the lands, under the verbal agreement, terminated on the death of the husband, as that agreement conferred no right which could affect the estate of the wife as survivor. And the defendant, on holding over after the husband's death, and without the widow's consent, became a trespasser, and was not entitled to notice to quit. *Torrey v. Torrey*, 14 N. Y. 430.

³ *Ante*, § 62.

⁴ *Right v. Beard*, 13 East, 210; *Doe v. Stanion*, 1 M. & W. 695, 700; *Jackson v. Miller*, 7 Cow. 747; *Doe v. McKaeg*, 10 B. & C. 721; *Doe v. Wood*, 14 M. & W. 682; *Dunne v. Trustees*, 39 Ill. 578; and see *ante*, §§ 25 and 60.

⁵ *Jackson v. French*, 3 Wend. 337; *Hanxhurst v. Lobree*, 38 Cal. 563;

§ 467. Tenancy from Year to Year only determined by Notice.

—A tenancy from year to year, being, for all purposes of notice to quit, a general tenancy at will, requires a formal notice by either landlord or tenant as the case may be.¹ For if, after the expiration of a term of years, the tenant continues in possession by consent of his landlord, the law will imply, in the absence of an express agreement, that the parties have renewed the previous agreement for at least another year;² it is, therefore, both necessary and reasonable, that, if either party should be inclined to change his mind, he should notify the other, before the expiration of the next or any following year, of his intention to put an end to the tenancy.³ And the mere unauthorized entry of a landlord will not defeat an estate of this description, nor can such a tenant be dispossessed.

Reed v. Reed, supra; Coomler v. Hefner, 86 Ind. 108. But by the statutes of several States, tenancies at will and sufferance are both entitled to notice. Thus in New York, Iowa, Kentucky, &c.; and see *ante*, § 64, and notes. And even in the former States a reasonable time is given him to get out. Thus, three days: *Hilbourn v. Fogg, 99 Mass. 11*; twelve days: *Clarke v. Wheelock, id. 14*; and forty-eight hours: *Pratt v. Farrar, 10 Allen, 519*; and see *Hooten v. Holt, 139 Mass. 54*; *Arnold v. Nash, 126 id. 397*.

¹ *Moshier v. Reding, 3 Fairf. 478; Oxley v. James, 13 M. & W. 209; Prouty v. Prouty, 5 How. Pr. R. 81; Doe v. Ridout, 5 Taunt. 519.* A tenancy from year to year does not depend on continuance of possession. *Ante*, § 58. A withdrawal by the tenant without notice to quit does not determine the tenancy. *Pugsley v. Aiken, 11 N. Y. 494.* But if a tenant personally receives notice to quit at a particular day without objection, it is an admission that his tenancy expires on that day. *Doe v. Biggs, 2 Taunt. 109; Thomas v. Thomas, 2 Camp. 647; Doe v. Wombwell, id. 559; Doe v. Forster, 13 East, 405.* And where the rent is payable for less periods than a year, the notice is proportioned thereto. Thus, in a tenancy by the month, a month's notice suffices. *Warner v. Hale, 65 Ill. 395; Creighton v. Sanders, 89 id. 543; Brownell v. Welch, 91 id. 523; Woodrow v. Michael, 3 Mich. 187.* So a shorter notice than for six months may be given by statute in tenancies from year to year. *Leavitt v. Leavitt, 47 N. H. 329, 337; Leary v. Meier, 78 Ind. 393; Witte v. Witte, 6 Mo. App. 488; Vincent v. Corbin, 85 N. C. 108.*

² *Webber v. Shearman, 6 Hill, 20; Digby v. Atkinson, 4 Camp. 275; ante, § 60.* But in those States where tenancies from year to year do not exist, such holding constitutes a general tenancy at will, governed by the terms of the lease. See *ante*, §§ 55, 60.

³ *Morehead v. Watkyns, 5 Ky. 228.* The right to six months' notice to quit is mutual. *Id.*

sessed, unless a regular notice to quit has been served upon him.¹

§ 468. **Particulars of.**—With respect to this notice, there are several important particulars to be observed,—as, in what cases notice is necessary; when, by whom, and to whom, it must be given; its form and direction; how it must be served; and in what cases it will be deemed to have been waived. When a tenant for a year, or any other ascertained period, holds over without permission, no notice is of course necessary, since, without some fresh agreement, express or implied, the tenancy by its own terms is at an end.² And, as a general rule, there must be a present existing relation of landlord and tenant, to entitle a party to notice at all;³ but wherever a person has obtained possession of premises belonging to another, for some definite period, and the owner, after the expiration of that period, does some act from which it may be inferred that he intends to acknowledge him as his tenant, such as the receipt of rent accruing after the expiration of the original tenancy, or the like, the party will then be entitled to notice before he can be ejected.⁴ A tenant for years, also, who holds over, so as to create a tenancy from year to year, by implication and without any specific act of the landlord, is entitled to notice before he can be ejected.⁵ But the holding-over must be continued under such circumstances, and for such a length of time after the expiration of the term, as to authorize the implication of an assent on the

¹ *Hall v. Hall*, 6 G. & J. 386.

² *Logan v. Heron*, 8 S. & R. 459; *Cobb v. Stokes*, 8 East, 358; *Young v. Smith*, 28 Mo. 290; *Anderson v. McLeod*, 12 Johns. 182; *Knecht v. Mitchell*, 67 Ill. 86; *Bedford v. McElherron*, 2 S. & R. 49; *Hamit v. Lawrence*, 2 A. K. Marsh. 366; *Allen v. Jaquish*, 21 Wend. 628; *Secor v. Pestana*, 37 Ill. 525. So where a party held under an agreement for a lease of seven years, which was never executed. *Doe v. Stratton*, 4 Bing. 446.

³ *Jackson v. Deyo*, 3 Johns. 422. As a purchaser in possession under a contract for a deed. *Glascock v. Robards*, 14 Mo. 350.

⁴ *Jackson v. Miller*, 7 Cow. 747; *Bedford v. McElherron, supra*; *Jackson v. Salmon*, 4 Wend. 327; *Doe v. Brown*, 8 East, 165; *Doe v. Wood*, 2 B. & A. 724.

⁵ *Grant v. White*, 42 Mo. 285.

part of the landlord to its continuance.¹ And where the landlord waited three months and twelve days before instituting proceedings, it was held that he was not chargeable with laches, especially as it appeared that he had attempted to obtain possession without recourse to coercive measures.²

§ 469. Tenant under Void Lease or Agreement entitled to.— Where one enters under a lease which is void by the Statute of Frauds, he holds as a tenant at will, and although the receipt of rent will not establish the lease, it will still enure as a tenancy from year to year, for the purpose of a notice to quit;³ and at the day fixed for the end of the term it will expire by its own limitation.⁴ The same result ensues where he comes into possession under an agreement for a future lease or to purchase, and pays rent; for in either case he becomes a tenant from year to year.⁵ So, also, a tenant who takes possession of more land than he is entitled to by his lease, and pays rent for the whole, is entitled to notice as to the part not included in the lease.⁶ Where a defendant entered upon land with the owner's permission in his lifetime, made improvements, and remained there fifteen years, without any reservation of rent, it was held that his occupation was equivalent to a tenancy from year to year, and that the heir of the owner must give notice to the tenant before bringing ejectment.⁷

§ 470. Successors to Tenant's Estate when entitled to.— But though a tenancy from year to year is like a tenancy at

¹ *Rowan v. Lytle*, 11 Wend. 616; *Smith v. Littlefield*, 51 N. Y. 539.

² *Rowan v. Lytle*, *supra*. In *Smith v. Littlefield*, *supra*, the tenant held over two months; and see *ante*, § 22, and note.

³ *Schuylar v. Leggett*, 2 Cow. 660; *Doe v. Brown*, *supra*. So when made by an agent in his own name, the lease being void. *Murray v. Armstrong*, 11 Mo. 209. The owner of land who has leased it by parol for a year, in consideration of the lessee's taking care of certain trees thereon, cannot, on the lessee's neglecting to take care of the trees, maintain an action for possession against him, without a previous notice to quit. *Gleason v. Gleason*, 8 *Cush.* 32.

⁴ *Post*, § 472, and note.

⁵ *Thomas v. Wright*, 9 *S. & R.* 87; *Knight v. Benett*, 3 *Bing.* 361.

⁶ *Jackson v. Wilsey*, 9 *Johns.* 267.

⁷ *Den v. Mackay*, 1 *Penningt.* 420; *Jackson v. Bryan*, 1 *Johns.* 322; *Chicago, B. & Q. R. R. v. Knox College*, 34 *Ill.* 195.

will for the purpose of notice to quit, yet it is in other respects a term, and is not, like a tenancy at will, determined by implication, as by the death or alienation of either party;¹ but notice to quit must be given to the assignee or personal representatives, for they have the same interest in the land which the tenant had.² But the relation of landlord and tenant does not exist between the heir, or his tenant, and a purchaser under a judicial sale for the debt of the ancestor; hence neither of the former is entitled to notice to quit from the latter.³ It is to be observed, also, that the right to a notice to quit is reciprocal, and may be given as well by the tenant as by the landlord, who desires to put an end to the tenancy.⁴

§ 471. When not necessary.—Examples.—Notice to quit is unnecessary in any case where the relation of landlord and tenant does not exist. Thus, where a tenant went into possession of the premises after a judgment had been recovered, which was a lien upon the land, notice by the purchaser under the judgment was held to be unnecessary.⁵ And, if being in possession, he enters into a contract to purchase, but fails to complete his purchase, no demand is necessary; for by his own act, his interest in the premises has been determined.⁶ So where a man had obtained possession of a house without the landlord's permission, and afterwards entered into a negotiation for a lease, which failed, the same rule was held applica-

¹ *Ante*, § 58.

² *Doe v. Porter*, 3 T. R. 13; *Rex v. Inhabs. of Stone*, 6 *id.* 295; *Gulliver v. Burr*, 1 W. Bl. 596. But see *Hemphill v. Giles*, 66 N. C. 512.

³ *Jackson v. Robinson*, 4 Wend. 436.

⁴ *Hall v. Wadsworth*, 28 Vt. 410.

⁵ *Den v. Adams*, 7 Halst. 99. One who is illegally in possession of land is not entitled to notice to quit. *Petty v. Miller*, 15 B. Monr. 591.

⁶ *Smith v. Stewart*, 6 Johns. 46; *Jackson v. Moncrief*, 5 Wend. 26; *Maynard v. Cable*, Wright, Ohio, 18. For a similar reason, a tenant *pur autre vie*, who continues in possession after the determination of the life-estate, is not entitled to notice. *Livingston v. Tanner*, 14 N. Y. 64; and see *ante*, § 25, and note. But rent payable in advance is no condition precedent in either an oral or written lease, so as to dispense with notice to quit. *Bartlett v. Greenleaf*, 11 Gray, 98; *Sprague v. Quinn*, 108 Mass. 558.

cable.¹ A person who had held lands upwards of twenty years under an indenture, in which he covenanted to keep possession for the owners, and in the doing of which the owners agreed to save him harmless, was considered merely as a bailiff and not a tenant, nor entitled to notice.² So, one who held of a mortgagor, under a parol contract to purchase, was not entitled to notice.³ And, although a compensation for the enjoyment of the premises may have been received, yet if the relation of landlord and tenant has ceased to exist, notice may be dispensed with.⁴ It seems, however, that a reasonable *demand* of possession is necessary, where a party is let into possession under an unqualified agreement for a lease.⁵ A notice to quit may also be rendered unnecessary by the terms of the tenancy, whether at will or from year to year. As, where a tenant enters under a parol lease for a fixed time, which is a tenancy at will by statute,⁶ or under a void lease, and becomes a tenant at will, or from year to year, by retaining possession or paying rent,—his time will expire at the period fixed by the demise without a notice to quit.⁷ So where the lease contains a clause authorizing a re-entry in case the rent remains unpaid for fifteen days after it becomes due;⁸ or the holding is ter-

¹ Doe *v.* Quigley, 2 Camp. 505; Doe *v.* Boulton, 6 M. & S. 148.

² Jackson *v.* Sample, 1 Johns. Cas. 231. And a mere licensee, or visitor, or servant allowed to occupy has, of course, no right to notice. Herrell *v.* Sizeland, 81 Ill. 467; Howard *v.* Carpenter, 22 Md. 10; Doyle *v.* Gibbs, 6 Lans. 180; Johns *v.* McDaniel, 60 Miss. 486. An under-tenant, after the determination of his landlord's tenancy, becomes tenant at sufferance to the original lessor, and is not therefore entitled to notice, under Mass. Gen. Sts. c. 91, § 31. Evans *v.* Reed, 5 Gray, 308.

³ Jackson *v.* Stackhouse, 1 Cow. 122.

⁴ Right *v.* Bawden, 3 East, 260; Roe *v.* Prideaux, 10 *id.* 165; Jackson *v.* Laughhead, 2 Johns. 75. In Illinois, a tenancy at will is terminated by a demand of possession without any notice to quit. Dunne *v.* Trustees, 39 Ill. 578.

⁵ Jackson *v.* Rowan, 9 Johns. 330; Same *v.* Niven, 10 *id.* 335; Right *v.* Beard, 13 East, 110; Doe *v.* Jackson, 1 B. & C. 448.

⁶ Elliott *v.* Stone, 1 Gray, 574; Knecht *v.* Mitchell, 67 Ill. 86; Fry *v.* Day, 97 Ind. 348; McClure *v.* McClure, 74 *id.* 108; Alcorn *v.* Morgan, 77 *id.* 184; and *ante*, § 80.

⁷ Tress *v.* Savage, 4 Ellis & B. 36; Doe *v.* Stratton, 4 Bing. 446; Doe *v.* Moffatt, 15 Q. B. 257; Berry *v.* Lindsley, 3 Mann. & G. 514.

⁸ Keeler *v.* Davis, 5 Duer, 507.

minated by a conditional limitation;¹ or is to end on the lessor's demand.²

§ 472. To Entitle to, must be Privity.—Acts of Tenant to render Unnecessary.—As a general rule, also, to entitle a defendant to notice, there must be some privity, either of contract or of estate, between himself and the lessor; for, where a lessee agreed to sell his lease for a certain sum, indorsed his name upon it, and delivered it to the assignee, who paid him the consideration money therefor, and agreed to pay the rent due and to become due on the lease,—it was held to be an agreement for a sale, and that the relation of landlord and tenant did not exist between them, so as to entitle the purchaser to notice.³ So, if a tenant at will or from year to year disclaims his tenancy, by accepting a conveyance in fee from a stranger, attorning to another landlord, or permitting a stranger to take possession of or exercise acts of ownership over the premises; or is guilty of collusion with such person, and suffers him to take possession in opposition to the landlord from whom he accepted the lease, the landlord may, in

¹ *Ashley v. Warner*, 11 Gray, 43; *Creech v. Crockett*, 5 *Cush.* 133. So where the tenant is to remain so long as he is in the employ of the landlord: *Grosvenor v. Henry*, 27 *Iowa*, 269; or on condition of running a sawmill, which he subsequently abandons: *Crawley v. Mullins*, 48 *Mo.* 517. And where the term is to end on sixty days' notice of a sale by the lessor, no further notice is required. *Miller v. Levi*, 44 *N. Y.* 489. So, where by statute the lease is to be absolutely void if an unlawful use shall be made of the premises, and the landlord is given a right of re-entry therefor, he may enforce this without giving the tenant any notice. *Prescott v. Kyle*, 103 *Mass.* 381. But if the lease is to end on a condition or act within the control of the landlord, the tenant is entitled to reasonable notice thereof. *Shaw v. Hoffman*, 25 *Mich.* 162.

² *People v. Schackno*, 48 *Barb.* 551; *Post v. Post*, 14 *id.* 253. So where the tenant was to stay from year to year "if he suited the landlord." *Whetstone v. Davis*, 34 *Ind.* 510. Or where by its terms the lease was to last so long as the tenant pays rent, and the landlord has power to let. *Wood v. Beard*, 2 *L. R. Exch. Div.* 30. Or where the landlord sets up a claim hostile to the tenant's right. *Eberwine v. Cook*, 74 *Ind.* 377. So where the tenant from year to year accepts a new lease for a fixed term the prior tenancy is terminated and no notice is necessary to end the new tenancy before the end of the term. *Roosevelt v. Hungate*, 110 *Ill.* 595.

³ *Jackson v. Kingsley*, 17 *Johns.* 158.

either case, consider him a trespasser, and need not give him notice to quit.¹ But if the acts of the tenant do not amount to a wilful disavowal of the landlord's title, he is entitled to notice; thus, a refusal to pay rent to a devisee, under a contested will, accompanied with a declaration that the tenant was ready to pay the party who should be entitled to receive it, is not of itself a sufficient disclaimer for this purpose.² Nor is a notice required in any case of adverse possession. As where a person defended an action of ejectment as landlord, and the occupants suffered judgment by default, the defendant was not permitted to object that the tenants in possession had not received notice to quit from the lessor of the plaintiff, who claimed adversely to the party under whom the tenants occupied.³ And where the grantor of a lot of land remained in possession for twenty-seven years, and no act of ownership on the part of the grantee was shown, it was held that there was no relation of landlord and tenant subsisting between the grantor and those claiming under the grantee, and that the defendant was not entitled to notice to quit.⁴

§ 473. Acts of Landlord to render Unnecessary.—If the landlord accepts another person as tenant, or does any other act which amounts to an assent on his part that there shall be a determination of the tenancy, the necessity of giving notice on the part of the tenant is also dispensed with.⁵ As, for instance, where the landlord, in the middle of a quarter, accepted the key of the house, and, according to the lease, it

¹ *Jackson v. Wheeler*, 6 Johns. 272; *Same v. Deyo*, 3 *id.* 422; *Harrison v. Middleton*, 11 Gratt. 527; *Allen v. Paul*, 23 *id.* 332; *Fuller v. Sweet*, 30 Mich. 237; *Steinhauser v. Kuhn*, 50 *id.* 367; *Stephens v. Brown*, 56 Mo. 23; *Sharpe v. Kelley*, 5 Den. 431; *Den v. Blair*, 3 Green, 181; *Meriman v. Caldwell*, 8 Ky. 32; *Vincent v. Corbin*, 85 N. C. 108; *Doe v. Grubb*, 10 B. & C. 816; *Doe v. Pittman*, 2 Nev. & M. 673; and see *post*, § 522. A notice to quit is unnecessary when upon a demand of possession the party occupying refuses to give up the possession, claiming the property to be his own. *Landsell v. Gower*, 17 Q. B. 589.

² *Tuttle v. Reynolds*, 1 Vt. 80; 3 *id.* 26; *Woodward v. Brown*, 13 Pet. 1; *Jackson v. Wheeler*, *supra*; *Doe v. Frowd*, 4 Bing. 557.

³ *Doe v. Creed*, 5 Bing. 327.

⁴ *Jackson v. Burton*, 1 Wend. 341; *Jackson v. French*, 3 *id.* 337.

⁵ *Graham v. Anderson*, 3 Harringt. 364; *Sparrow v. Hawkes*, 2 Esp. 504.

had been agreed that the rent should cease upon the tenant giving up possession, no notice was required.¹ But in a case where the tenant had quit the premises before the year was out, and neglected to give his landlord notice, who sued for a whole year's rent, and the tenant set up in his defence, that after he quit the premises the landlord put up a bill in the window and endeavored to let the house, it was held that such an act on the part of the landlord was only for the benefit of the tenant, and no evidence that the landlord thereby consented that the tenancy should be terminated, but that it required other circumstances to show conclusively that such was the landlord's intention.²

§ 474. Mortgagor in Possession, when Entitled to. — According to the English law, a mortgagor in possession, being only a tenant by sufferance, is not entitled to notice; nor, if he lets a person into possession as tenant from year to year, is such tenant entitled to notice, either from the mortgagee or his assignee; and this, whether the tenant has been let into possession before the assignment or after.³ And the same rule prevails in Massachusetts, Connecticut, New Jersey, Pennsylvania, and North Carolina.⁴ A different rule, however, applied in New York, even previous to the Revised Statutes; for a mortgagor was held entitled to notice before an ejectment, on the ground of privity of estate, and the tenancy at will, which existed by implication; although the rule, it was said, did not apply to the case of an assignee of the mortgagor, because there was no privity between him and the mortgagee.⁵ But the common-law doctrine of notice in mort-

¹ *Whitehead v. Clifford*, 5 *Taunt.* 518.

² *Redpath v. Roberts*, 3 *Esp.* 225; *Selw. N. P.* 1289.

³ *Keech v. Hall*, *Doug.* 22; *ante*, §§ 121, 122. Nor where the tenant was let into possession after the original mortgage was made, but before an assignment of it, for the purpose of bringing ejectment. *Thunder v. Belcher*, 3 *East*, 448.

⁴ *Groton v. Roxbury*, 6 *Mass.* 50; *Rockwell v. Bradley*, 2 *Conn.* 1; *Wakeman v. Banks*, *id.* 445; *Hart v. Stockton*, 7 *Hals.* 322; *McCall v. Lenox*, 9 *S. & R.* 311; *Williams v. Bennett*, 4 *Ired.* 122.

⁵ *Jackson v. Hopkins*, 18 *Johns.* 487; *Same v. Laughhead*, 2 *id.* 75; *Same v. Fuller*, 4 *id.* 215.

gage cases is now entirely superseded in that State by the Revised Statutes; and the action of ejectment itself, by a mortgagee or his assigns, is abolished.¹

§ 475. **When to be given.** — **Length of.** — As to the time when notice must be given, and the length of such notice, the common law requires that, in all cases of a tenancy from year to year, there shall be a notice of at least half a year, and for shorter tenancies a notice corresponding to their length.² The former is not merely six lunar months, but one hundred and eighty-three days,³ or six calendar months, ending with the period of the year at which the tenancy commenced,⁴ before an ejectment can be brought against the tenant.⁵ This rule is said by Chancellor Kent to prevail in Kentucky, as well as in Tennessee, North Carolina, and Vermont.⁶ In Massachusetts, as there are no tenancies from year to year, this rule of six months has not been adopted,⁷ but in all cases of uncertain tenancy, the parties must give to each other reasonable notice of an intention to terminate the estate;⁸ and in one

¹ 2 R. S. 312, § 57.

² Doe *v.* Scott, 4 Bing. 362; Doe *v.* Hazell, 1 Esp. 94.

³ Gulliver *v.* Burr, 1 W. Bl. 596; Right *v.* Darby, 1 T. R. 159. But if a *six months'* notice is stipulated for, *six* lunar months suffice. Rogers *v.* Dock Co., 34 L. J. Ch. 165.

⁴ Doe *v.* Porter, 3 T. R. 13; Bessell *v.* Landsberg, 7 Q. B. 638; Doe *v.* Watts, 7 T. R. 83. In England, however, when the days of rent fall on the quarterly feast-days, the notice must run from and to these days, though its length, thereby, may be greater or less than six months. Morgan *v.* Davitt, 3 L. R. C. P. Div. 260. And where the letting is less than from year to year, the same rule applies, that the notice should end with the term. Anderson *v.* Prindle, 23 Wend. 616; Oakapple *v.* Copous, 4 T. R. 361; Wilson *v.* Abbott, 3 B. & C. 88; Kemp *v.* Derrett, 3 Camp. 511; Leavitt *v.* Leavitt, 47 N. H. 329, 338; Leem *v.* McLees, 24 Ill. 192; Gunn *v.* Sinclair, 52 Mo. 327.

⁵ But this notice may, if the parties agree, be for any period. Thus for one week. Cornish *v.* Stubbs, L. R. 5 C. P. 334.

⁶ 4 Kent, Com. 113; Nichols *v.* Williams, 8 Cow. 13; Hanchet *v.* Whitney, 1 Vt. 311; Trousdale *v.* Darnell, 6 Yerg. 431; Steadman *v.* McIntosh, 4 Ired. 291. So in New Jersey, Den *v.* Blair, 3 Green, 181; and Illinois, Hunt *v.* Morton, 18 Ill. 75.

⁷ Rising *v.* Stanward, 17 Mass. 287.

⁸ Ellis *v.* Paige, 2 Pick. 71; Coffin *v.* Lunt, 2 *id.* 70.

case, a notice of sixty days was held sufficient.¹ In Pennsylvania, the notice is understood to be one of three months, in all cases; as well without as within the statute of that State, passed in the year 1772.² In Maine, where tenancies from year to year do not exist, thirty days' notice expiring with a rent-day are required.³ The Revised Statutes of New York provide that "wherever there is a tenancy at will or by sufferance, created by the tenant, holding over his term or otherwise, it shall only be terminated by the landlord's giving one month's notice, in writing, to the tenant, requiring him to remove therefrom."⁴ And for the purpose of notice, a tenant from year to year is included in the phrase, "tenancy at will," as used in this statute.⁵ In Michigan, all estates at

¹ *Cutler v. Winsor*, 6 Pick. 335. But now, by Mass. Pub. Stat. 1882, c. 121, §§ 11, 12, all estates at will may be determined by either party, by notice in writing for three months, or equal to the interval between the rent-days; and in cases of neglect or refusal to pay rent due on a written lease, or a lease at will, fourteen days' notice, in writing, to quit, is sufficient. And no demand is necessary before giving this latter notice. *Borden v. Sackett*, 113 Mass. 214; but it is not good if it directs the tenant to leave forthwith, though served fourteen days before any action is taken. *Elliott v. Stone*, 12 Cush. 174. The former notice had to expire on a rent-day designated, though this might either be expressly specified, or described as that next to occur after the one on or before which the notice was given. *Sandford v. Harvey*, 11 Cush. 93. And the same rule was applied where the rent was payable in advance. *Walker v. Sharpe*, 14 Allen, 43. See post, §§ 476, 477, and notes.

² *Logan v. Herron*, 8 S. & R. 458; *Hutchinson v. Potter*, 11 Pa. St. 472. So by the act of December 14, 1863, amending the act of 1772. *Snyder v. Carfrey*, 54 Pa. St. 90; *Rich v. Keyser*, *id.* 86. The same rule prevails in South Carolina: *Godard v. S. C. R. R.*, 2 Rich. 346; and in New Hampshire: *Currier v. Perley*, 4 Fost. 219. But when the object is to take proceedings to obtain possession for the non-payment of rent, fifteen days is sufficient in Pennsylvania.

³ *Warren v. Prescott*, 62 Me. 115. Where, however, the rent is unpaid, thirty days' notice is necessary, but may be given at any time.

⁴ 1 R. S. 745, § 7. Under the Illinois act of 1861, all tenancies for less than a year in duration, and greater than a month, require thirty days' notice to terminate them; for less than a month they do not require such notice. *Dunne v. Trustees*, 39 Ill. 578.

⁵ *Bradley v. Covel*, *supra*. *Prouty v. Prouty*, 5 How. Pr. R. 81; *People v. Darling*, 47 N. Y. 666. Where the tenant agreed orally to hire premises for thirteen months and after occupying them for two months vaca-

will may be determined by either party, upon giving three months' written notice to the other; and when the rent reserved is payable at periods of less than three months, the time of such notice will be sufficient, if it be equal to the interval between the days of payment.¹

§ 476. **Form of.** — The notice may be given to quit on a particular day; or, in general terms, at the end of the current year of the tenancy, which will expire next after the service of the notice; or, in one month after the next rent-day.² The latter form of expression is generally used where the landlord is ignorant of the period when the tenancy commenced; and it is preferable even when the commencement of the tenancy is known, as it provides against any misapprehension of the exact day when the tenant entered. For where a term of years has expired, and a new year has been entered upon, the parties have a right, as we have seen, to hold each other to the tenancy for the residue of that year, and therefore the time required for quitting must expire with the current year. And as neither party has a right to put an end to the tenancy before the expiration of the year, if the occupation goes beyond that period, a new year has again been entered upon, and a right to enjoy it arises.³

ted them, it was held that although the agreement for hiring, being for more than a year, was void under the Statute of Frauds, yet that, until the termination of the thirteen months, the tenancy was from month to month, and that the tenant could not be compelled to quit without a month's notice. *Geiger v. Braun*, 6 *Daly*, 506; distinguished from *Gibbons v. Dayton*, 4 *Hun*, 415, in which latter case nothing appeared to show the nature or contemplated duration of the tenancy.

¹ R. S. of Michigan of 1838, 22, 226. And in all cases of neglect or refusal to pay rent, due on a lease at will, fourteen days' notice to quit, given by the landlord, is sufficient, in the latter State, to determine the lease.

² *Doe v. Butler*, 2 *Esp.* 589; provided the interval required by law is given. *Snyder v. Carfrey*, 54 *Pa. St.* 90; *Duffy v. Ogden*, 64 *id.* 240; *Prescott v. Elm*, 7 *Cush.* 346; *Currier v. Barker*, 2 *Gray*, 224, 226; *Sandford v. Harvey*, 11 *Cush.* 93. And where a tenant held over, but was to have a month's notice, it was held that this could be given to him at any time. *May v. Rice*, 108 *Mass.* 150. In New York, however, the law is different. See *post*, § 477, and note.

³ *Sauvage v. Dupuis*, 3 *Taunt.* 410; *Jackson v. Bryan*, 1 *Johns.* 322; *Hanchet v. Whitney*, 1 *Vt.* 311; *ante*, § 55.

§ 477. Day named to correspond to Conclusion of Term. — If a particular day is named in the notice, it must be the day of, or corresponding to, the conclusion of the tenancy, and not to its commencement; for if the latter day is named, the possession of the tenant for a new term has begun, and if so, for however short a time, his holding must continue until determined by a new notice.¹ If even a special agreement is made

¹ *Fox v. Nathans*, 32 Conn. 348; *Ackland v. Lutley*, 9 Ad. & E. 879. The cases bearing on this point have been far from uniform or clear; but the proposition in the text seems supported by the weight of authority and to be sounder on principle. The difficulty has mainly arisen from reference to the *rent-day* as the proper day for the expiration of the notice, without limiting this to the strict rent-day at common law. The rule as usually laid down has been that, in allowing the proper period, the notice must be given not later than the day corresponding to the rent-day. *Bay St. Bank v. Kiley*, 14 Gray, 492; *Johnson v. Stewart*, 11 *id.* 181; *Blish v. Harlow*, 15 *id.* 316; *Atkins v. Sleeper*, 7 Allen, 487; and a notice served on that day is sufficient. *McGowan v. Lennett*, 1 Brewst. 397; *Isaacs v. Roy. Ins. Co.*, L. R. 5 Exch. 296, 300. This was applying to tenancies at will a similar rule to that obtaining in tenancies from year to year, by which the notice was required to terminate with the holding: *Baker v. Adams*, 5 Cush. 99; that is, as it was said, *to expire on a rent-day*: *Prescott v. Elm*, 7 Cush. 344; *Hultain v. Munigle*, 6 Allen, 220; *ante*, § 476, note. But the rent-day was referred to not because it was such, but because it was the last day of the term; for at common law the rent became due not *after* the term expired, but on the last day, and at the last minute thereof, though it was demandable at sunset: *Prescott v. Elm*, *Hultain v. Munigle*, *supra*; *Duppa v. Mayo*, 1 Saund. 287; *Queen v. St. Mary Warwick*, 1 Ellis & B. 816; though suit cannot be begun until this day has wholly expired: *Decker v. McManus*, 101 Mass. 63. The law as to the demand of payment of a note is in direct analogy. Hence, it was said that the notion of a rent-day out of the term was unintelligible. *Ackland v. Lutley*, *supra*; and a notice to quit *on* Michaelmas or a lease *from* Michaelmas was held good in this respect. *Doe v. Lea*, 11 East, 312. Where rent, therefore, is payable in advance on the first or other day of the term, or payable out of the term, the notice cannot expire on a rent-day. But this was held otherwise in *Walker v. Sharpe*, 14 Allen, 43, where the rent was payable on the first day of the term. On the other hand, a different conclusion from the text seems intimated, though with some doubt, in *Waters v. Young*, 11 R. I. 1; *Thurber v. Dwyer*, 10 *id.* 355; and in *Steffins v. Earl*, 11 Vroom, 128, the rule of the text is controverted, the court saying: “No case, I think, can be found which holds that a notice to quit is invalid merely because it names as the day to quit a day which corresponds in date with the day named in the original letting,

between the parties, empowering them to determine the tenancy by a shorter notice than the one required by law, or obliging them to give one for a longer period, the notice must, nevertheless, expire at the end of the current year of the tenancy, unless some agreement to the contrary is made. Though, if it be not a tenancy from year to year, determinable at a quarter's notice, but a demise “*for one year only, and then to continue tenant, and quit at a quarter's notice,*” the notice may expire at the end, though not in the middle of any quarter.¹

§ 478. **Waiver by Tenant of Irregularity in.** — Although the notice be irregular in respect to the time named for its expiration, yet if the tenant, at the time of the delivery of the notice, assents to the terms of it, his assent will waive the irregularity.² But the words, “I pay rent enough already, whatever the words of the letting;” and further: “The cases in . . . Massachusetts are put upon the construction of their statute concerning notices in cases of uncertain tenancy, with rent payable at uncertain intervals,” citing *Walker v. Sharp, supra*. In *Steffins v. Earl*, the letting was to begin May 1 with monthly rent, and a notice on June 29 to quit and deliver up August 1 was held sufficient. But in Michigan it is held that the notice must be given a full month before the day on which a new holding will begin. *Hart v. Lindley*, 50 Mich. 20, and see *Petsch v. Biggs*, 31 Minn. 392. In England, if the day of commencement of a lease is not expressly fixed, the quarterly rent-days will control the date of the lease. *Sandhill v. Franklin*, L. R. 10 C. P. 377.

¹ *Doe v. Donovan*, 1 Taunt. 555; *Kemp v. Derrett*, 3 Camp. 510; *Rex v. Herstoneaux*, 7 B. & C. 551; *Collett v. Curling*, 10 Q. B. 785; and where notice was to be given *at any time hereafter*, it was decided it need not expire at the end of a year or quarter. *Bridges v. Potts*, 17 C. B. N. S. 314; *Doe v. Grafton*, 18 Q. B. 496. Under the New York statute, the notice need not specify any time at which the tenant must remove; and at the expiration of a month from the service of notice requiring him to remove, — that is, in cases of a tenancy at will, or by sufferance, — the landlord may take proceedings to compel his removal. *Burns v. Bryant*, 31 N. Y. 453; *People v. Schackno*, 48 Barb. 551. In these cases the notice specified a time less than the month required by the statute, but the court held that forasmuch as a specification of time was unnecessary it did not vitiate the notice, but at the expiration of a month from the service of notice the landlord might re-enter.

² A mistake in the notice clearly explainable by the dates given and the other language in the notice will not vitiate the notice. See *Wenger v. Campbell*, 104 Pa. St. 33.

and it is hard to use me thus," do not amount to an acceptance of such a notice.¹ A tenant sometimes enters upon different parts of the land at different periods of the year, although all are contained in one demise; notice must, in such case, be given with reference to the substantial time of entry, that is, to the time of entry on the substantial part of the premises; though the tenant, it is said, will be obliged to quit the particular parts only at the respective times of entry thereon.² This substantial time of entry must, in general, be determined by the times when the rent is payable; but it has been held to depend either upon the general custom of the country where the lands lie, or upon the relative value and importance of the different parts of the demised premises; and of these facts it is the province of a jury to determine.³

§ 479. Must be in Name of Landlord. — By Tenants in Common and Joint Tenants. — Agents. — Partners. — The notice must be in the name of the landlord, though it need not require possession to be delivered to him.⁴ When two or more persons are interested in the premises as tenants in common, notice by one, on behalf of himself and his co-tenants, will be valid only so far as his own share is concerned, unless he was acting at the time under the authority of the other parties mentioned in the notice.⁵ But where they are interested as

¹ *Oakapple v. Copous*, 4 T. R. 361. Where a tenant continues to hold after the expiration of his lease as a tenant at will, and assigns to another, the tenancy of the assignee will be held to commence at the day on which the original tenancy commenced under the lease; and notice to quit on that day is good, notwithstanding the assignee came in on a different day. *Doe v. Samuel*, 5 Esp. 173.

² *Doe v. Spence*, 6 East, 120.

³ *Doe v. Snowdon*, 2 W. Bl. 1224; *Doe v. Watkins*, 7 East, 551; *Doe v. Howard*, 11 *id.* 498.

⁴ *Doe v. Foster*, 3 C. B. 215. But a general agent may give a notice in his own name if sanctioned by the landlord and known to his tenants. *Jones v. Phipps*, 9 B. & S. 761. A notice must be signed either by the landlord or his agent. *Bull v. Peck*, 43 Ill. 482.

⁵ *Doe v. Chaplin*, 3 Taunt. 120; *Right v. Cuthell*, 5 East, 491; *Doe v. Sybourn*, 2 Esp. 677; or unless his act is ratified prior to the operation of the notice: *post*, note 6. But a notice by a lessor will enure to the benefit of his assignee. *Glenn v. Thompson*, 75 Pa. St. 389.

joint tenants, the notice need not be signed by all; for the act of one is supposed to be for the benefit of the others, and is sufficient when acting on their behalf. The lessee holds of all so long as he and all shall please; and as soon as any one of the joint tenants gives notice to quit, he in fact puts an end to the tenancy.¹ If they have appointed an agent, who gives the notice on behalf of all, under an authority derived from some only of the joint owners, it is sufficient, if the other owners subsequently recognize his authority before the notice takes effect.² But where joint lessors are partners in trade, notice by one, in the name of all, is good, for it will be presumed he had authority from his partners.³

§ 480. Unauthorized, not cured by subsequent Adoption.—

By Receivers. — Corporate Officers. — A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice given by an unauthorized agent cannot be made good by any adoption of it by the principal, after the proper time of giving it.⁴ So notice *by the agent* of an agent is not sufficient, without a subsequent recognition by the principal;⁵ nor when given by a mere agent to receive

¹ Doe *v.* Summersett, 1 B. & Ad. 135. And the same rule has been applied in a case where there were four trustees of the estate, but no joint tenancy appeared: Alford *v.* Vickery, Carr. & M. 280; Doe *v.* Hughes, 7 M. & W. 139; and as tenants in common have as to possession equal unity with joint tenants, there seems no reason for difference between them as to notice. In Pickard *v.* Perley, 45 N. H. 188, Doe *v.* Summersett was denied to be law, and a notice by less than all the lessors, whether joint tenants or tenants in common, was held defective. The entry of one joint tenant, or tenant in common, enures to the benefit of all. Young *v.* Adams, 14 Ky. 127.

² Doe *v.* Walters, 10 B. & C. 626; Right *v.* Cuthell, 5 East, 491; Pickard *v.* Perley, *supra*; and the case of Goodtitle *v.* Woodward, 3 B. & A. 689, which allowed ratification at any time, cannot be regarded as law. *Id.* For the principle of agency is, that ratification must take place without prejudice to intervening rights. *Id.*; Story, Agency, § 246.

³ Doe *v.* Hulme, *supra*.

⁴ Doe *v.* Goldwin, 2 Q. B. 143; Brahn *v.* Jers. City Forge Co., 38 N. J. 74. So a notice by one to whom the lessor has agreed to convey is inoperative. Reeder *v.* Sayre, 70 N. Y. 180.

⁵ Doe *v.* Robinson, 3 Bing. N. C. 667. But an attorney at law may act for an attorney in fact. Eldredge *v.* Holway, 18 Ill. 445.

rents, unless he has authority to let as well as to receive.¹ A receiver appointed by the Court of Chancery, with a general authority to lease lands from year to year, has also authority to determine such tenancies by a notice to quit; for if he has power to let, he must necessarily have the power of determining how long he will let.² So the proper officer of a corporation may give notice, without an express authority for doing so, if the corporation afterwards adopts the act of its officer.³

§ 481. To whom to be Given. — The notice must be given by the lessor to the immediate tenant or to his assignee, though another be in possession.⁴ A lessor cannot give a valid notice to a sub-lessee, nor an under-tenant to the original landlord, since there is neither privity of contract nor of estate between them;⁵ but the landlord's notice to his tenant will enable him to recover the premises against an under-tenant.⁶ It need not be directed to the tenant by name, provided it be personally served upon him;⁷ and, when personally served on the proper individual, a mistake in the Christian name will be of no importance.⁸ Where the premises are in possession of two or more, as joint tenants or tenants in common, a written notice addressed to all, and served upon one only, will be good

¹ *Doe v. Mizem*, 2 Moo. & R. 56. Notice given to a mere agent to collect rents is not good. *Pearse v. Boulter*, 2 F. & F. 133. Where aided by the acknowledgment of an attorney, clear proof that he was the attorney must be given. *Doe v. Roe*, 1 C. B. 711.

² *Wilkinson v. Colley*, 5 Burr. 2694; *Doe v. Read*, 12 East, 57, 61.

³ *Roe v. Pierce*, 2 Camp. 96.

⁴ *Livingston v. Baker*, 10 Johns. 270; *Doe v. Williams*, 6 B. & C. 41.

⁵ *Pleasant v. Benson*, 14 East, 234; *Roe v. Wiggs*, 5 B. & P. 330.

⁶ *Roe v. Wiggs, supra*; *Cox v. Brain*, 3 Taunt. 95; *Jackson v. Baker*, 10 Johns. 270. And where the original tenant has quit, and another has taken possession, it will be presumed, in the absence of any evidence to the contrary, that the latter has come in as assignee of the former, though he has never paid rent; and notice served on such assignee will be good. *Doe v. Williams, supra*; *Doe v. Murless*, 6 M. & S. 110.

⁷ *Doe v. Wrightman*, 4 Esp. 5.

⁸ *Doe v. Spiller*, 6 Esp. 70. Or if received by a member of his family who understands it to be intended for him. *Clark v. Keliher*, 107 Mass. 406. So a notice to a married woman addressed to "Mr. C." is not defective. *Cook v. Cresswell*, 44 Md. 581.

notice ; at least it raises a presumption that the notice reached the other tenants in common, although they may live at a distance.¹ And when the original tenant has quit the premises, and another taken possession, it will be presumed, in the absence of proof to the contrary, that the latter came in as assignee of the former, though he may never have paid rent ; and it will, in that case, be sufficient to serve notice upon the assignee.² When a corporation is tenant, the notice must be given to the corporate name, and served upon one of its officers ; if addressed to the officers, it will be insufficient.³ If the notice be given by the tenant, it must be given to his immediate landlord, that is, to the person to whom he is bound to pay rent, or his agent, and not to the superior or head landlord. If he makes a mistake as to the period of the tenancy, it will not have the effect of determining the lease, and the tenant himself may take advantage of the defect. Such notice is not good as a notice to quit, nor does it operate as a surrender, inasmuch as it is to take effect *in futuro*.⁴

§ 482. By Landlord, to be in Writing. — At common law, the notice might have been verbal, unless when a written notice was made necessary by agreement of the parties.⁵ But the statutes referred to require the landlord's notice to be in writing ; and, therefore, a mere verbal request from the landlord to the tenant to quit will not put an end to a tenancy at will, or by sufferance.⁶ And as a tenancy from year to year cannot be determined, unless by a legal notice or a surrender in due form of law, a mere parol license to quit, and the tenant's leaving the premises accordingly, will not determine the tenancy ; for this would amount to a surrender, which, under the statute, must be in writing.⁷

¹ Doe *v.* Watkin, 7 East, 551 ; Doe *v.* Crick, 5 Esp. 196.

² Doe *v.* Williams, *supra* ; Doe *v.* Murless, *supra*.

³ Doe *v.* Woodman, 8 East, 228. A notice to a corporation may be served on the pastor if the former know of it. Godfrey *v.* Walker, 42 Ga. 562.

⁴ Doe *v.* Milward, 3 M. & W. 328.

⁵ Timmins *v.* Rowlinson, 3 Burr. 1603 ; Thanner *v.* Hambrog, 2 Brewst. 528 ; Eberlein *v.* Abel, 10 Bradw. (Ill.) 626.

⁶ Doe *v.* Crick, 5 Esp. 196 ; Roe *v.* Pierce, 2 Camp. 96.

⁷ Mollett *v.* Brayne, 2 Camp. 103 ; Thomson *v.* Wilson, 2 Stark. 379 ;

§ 483. **Form of Words of.—Description of Premises.**—The notice must be explicit and positive; in the words of the statute, “it must require the tenant to remove from the premises.”¹ It should not, therefore, in any case, give the tenant the mere option of leaving the premises, or require him to enter into a new contract on certain conditions, or the like. And in some States if it does not fix or distinctly indicate the day when the tenant is required to quit, it will be insufficient although expressed to be given for the purpose of determining the tenancy.² But a notice, if intelligible, although not accurately worded, is generally sufficient: thus a notice, “to remove, or I shall insist on double rent,” has been held good; because the latter evidently refers only to the penalty inflicted by the statute, in case the tenant should continue to hold over. In this case, however, it was said, by Lord Mansfield that if the notice had contained the option of a new agreement, as for instance, “remove, or else that you agree to pay me double rent,” it would not have been sufficient.³ And in case there should

Grimman v. Legge, 2 Mann. & R. 438. But the law was held otherwise in *Farson v. Goodale*, 8 Allen, 202, where a parol license to quit, followed by tenant’s actually quitting, was held a waiver of written notice. So an agreement upon an oral letting, that the tenant may quit whenever he pleases at a moment’s notice, renders the tenant not liable for rent after he has given such notice, and he is not obliged to give the statute notice. The principle is stated to be that the parties may agree between themselves as to the time and manner in which the tenancy may be terminated. *Davis v. Murphy*, 126 Mass. 143, distinguishing *Batchelder v. Batchelder*, 2 Allen, 105. See *McGlynn v. Brock*, 111 Mass. 219.

¹ And under the act of April 3, 1830, for non-payment of rent, the notice must state the amount of rent due. *Clark v. Everly*, 2 Clark, Pa. 219.

² *Steward v. Harding*, 2 Gray, 335; *Ayres v. Draper*, 11 Mo. 548.

³ *Doe v. Jackson*, Doug. 175; *Doe v. Smith*, 5 Ad. & E. 350; *Granger v. Brown*, 11 Cush. 191; *Currier v. Barker*, 2 Gray, 224; *Wenger v. Campbell*, 104 Pa. St. 33. A notice to quit at the end of the current year of the tenancy, “on failure whereof I shall require you to pay me double the former rent for so long as you detain possession,” is an unqualified notice, and does not give the tenant an option. *Doe v. Goldwin*, 2 Q. B. 143. Where a tenant is entitled to six months’ notice, a notice to quit “at the expiration of the present year’s tenancy” is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. *Doe v. Timothy*, 2 Carr. & K.

be an obvious mistake in some part of the notice, but yet, upon the whole, it is so certain and direct as to make it impossible that the person receiving the notice should have been misled by it, it will be good. As, for instance, where the landlord gave his tenant notice in the following form: "I hereby give you notice to remove from the premises which you hold of me, situated in the parish of St. Anne, called *The Waterman's Arms*," when, in fact, the only premises which the tenant held of him were called the "Bricklayer's Arms;" in this case, upon its being shown that there was no sign of the "Waterman's Arms" in the parish of St. Anne, that the tenant held no other premises of the plaintiff but "*The Bricklayer's Arms*," and that, therefore, the tenant could not possibly have been misled by the mistake, the notice was held sufficient.¹ The notice must include all the premises held under the same demise; for a landlord cannot determine the tenancy as to a part of the thing demised, and continue it as to the residue.² But where they were described as of a wrong parish, the court, after verdict, held it to be immaterial; as the defendant did not show that he held any other premises of the plaintiff, or that he was misled by the notice.³ Yet if the tenant misleads the landlord, by giving him wrong information, he will be bound by it; and Lord Kenyon held, in the case referred to, that it made no difference whether the information so given proceeded from mistake or design, as it had equally the effect of leading the landlord into error.⁴

§ 484. Sufficient Service of. — It seems also settled that, when personal service cannot be effected, it will be sufficient

351. The words "to leave" are held synonymous with the statute words "to quit." *Douglass v. Anderson*, 32 Kan. 350.

¹ *Doe v. Cox*, 4 Esp. 185; *Doe v. Kightly*, 7 T. R. 63; *Doe v. Culliford*, 4 D. & R. 248; *Blish v. Harlow*, 15 Gray, 316; *Clark v. Kelihier*, 107 Mass. 406; *Farnam v. Hohman*, 90 Ill. 312; *Whipple v. Shewelte*, 91 Ind. 114.

² *Doe v. Archer*, 14 East, 245; *Doe v. Benson*, 4 B. & A. 588.

³ *Doe v. Wilkinson*, 12 Ad. & E. 743. So *Congdon v. Brown*, 7 R. I. 19. Moreover, defects in a notice may be waived by the conduct of the party receiving it. *Boynton v. Bodwell*, 113 Mass. 531.

⁴ *Doe v. Lambly*, 2 Esp. 635.

if notice is left with the husband, wife, or a servant of the tenant, at his usual place of residence, whether upon the demised premises or elsewhere, and its nature and contents explained at the time, and that whether the tenant received the notice or not.¹ But the mere leaving a notice to quit at the tenant's house with a servant, without further proof of its having been explained to him, or that it came to the tenant's hands, is not sufficient.² The Revised Statutes of New York direct that it "shall be served by delivering the same to the tenant, or to some person of proper age residing on the premises; or, if the tenant cannot be found, and there be no such person residing on the premises, such notice may be served by affixing the same on a conspicuous part of the premises, where it may be conveniently read. . . . And, at the expiration of one month from the service of such notice, in the manner above specified, the landlord may re-enter, or maintain his remedy of ejectment, or proceed in any other manner pre-

¹ *Jones v. Marsh*, 4 T. R. 464; *Doe v. Watkins*, 7 East, 551; *Doe v. Dunbar*, Mood. & M. 10; *Roe v. Street*, 4 Nev. & M. 42; *Liddy v. Kennedy*, L. R. 5 H. L. 134; *Cook v. Creswell*, 44 Mo. 581. So in Massachusetts, *Blish v. Harlow*, 15 Gray, 316; and a notice to quit a shop was held sufficiently served if delivered to a partner. *Walker v. Sharpe*, 103 Mass. 154. So where the notice was addressed to the original tenant and served on the father of the party in possession, to whom the tenant had sold, and the party in possession received and read it. *Farnam v. Hohman*, 90 Ill. 312. So where the street on which the premises were situated was described by a wrong name the service was held sufficient notwithstanding. *Congdon v. Brown*, *supra*. In Indiana, by statute, service may be made on the tenant whether on or off the premises, or, if he cannot be found, on some one of proper age residing on the premises, *Epstein v. Greer*, 78 Ind. 348, first making known to such person the contents of the notice. *Jenkins v. Jenkins*, 63 *id.* 415. Where a determination of the tenancy was provided for in the lease, to be by notice delivered to the lessee, and no constructive notice was provided for, it was held that service by sending the notice to the tenant's last known address (he having disappeared some years previously) was insufficient to determine the tenancy. *Hogg v. Brooks*, 14 Q. B. D. 475; s. c. on app. 15 *id.* 256.

² *Doe v. Lucas*, 5 Esp. 158; *Nicholson v. Tanham*, 18 W. R. 523. So where the notice was left with the servant of a boarding-house keeper where the tenant had resided and his wife remained, when by inquiry the tenant might have been found. *Giverville v. Stolle*, 9 Mo. App. 185.

scribed by law, to remove the tenant, without any further or other notice to quit.”¹

§ 485. **Waiver of, what Acts constitute.** — But the notice may be waived; for after the landlord has given notice, and the time has expired, he may do some act which amounts to a waiver of it, and recognizes a new or subsisting tenancy. As, if he makes a new demise² or receives rent as such, which has accrued after the expiration of the notice,³ or after that time distrains for rent whenever accrued, his notice will be considered as having been thereby waived, and the tenancy re-established.⁴ But it seems that a pending action, for use and occupation, will not invalidate the notice; for the landlord may only recover in his action rent due at the time of the expiration of the notice, although he may claim rent to a later period.⁵ So where rent is usually paid at a banker’s, if

¹ 1 R. S. 745; §§ 8, 9.

² Kelly v. Loehr, 1 Brewst. 313.

³ Goodright v. Cordwent, 6 T. R. 219; Collins v. Cantz, 6 Cush. 415. But if the rent accrued before the expiring of the notice, Kimball v. Rowland, 6 Gray, 224; or was merely demanded, Conner v. Jones, 28 Cal. 59; even if it accrued after such expiring, Blyth v. Dennet, 13 C. B. 178, — the notice is not waived.

⁴ Prindle v. Anderson, 19 Wend. 391; Whitney v. Sweet, 22 N. H. 219; Zouch v. Willingale, 1 H. Bl. 311. The case of Blyth v. Dennet, 13 C. B. 178, holds to the contrary, for the reason that in the case of a notice to quit, the tenancy is put an end to by the agreement of the parties, and, therefore, the determination cannot be waived without the assent of both, — drawing a distinction between this case, and that of a forfeiture, where the lease is voidable only at the election of the lessor. So, Dendy v. Nicholl, 4 C. B. n. s. 376, 381. In Hoff v. Baum, 21 Cal. 120, the lessor’s acceptance of an offer of larger rent, after the expiring of the notice to quit, though not communicated to the tenant, was held a waiver.

⁵ Per Buller, J., Birch v. Wright, 1 T. R. 378; Selw. N. P. 650. So acceptance of after-accruing rent is no waiver if lessor has already begun ejectment against tenant: Doe v. Meux, 1 C. & P. 346; and perhaps Blish v. Harlow, 15 Gray, 316, may proceed upon this ground. See *post*, § 497, and note. Nor is mere delay in ejecting tenant after notice has expired a waiver. Jackson v. Stafford, 2 Cow. 547; Boggs v. Black, 1 Binn. 333; Conner v. Jones, 28 Cal. 59; Babcock v. Albee, 13 Met. 273. But otherwise if the tenant is told he need not quit. Tuttle v. Bean, *id.* 275.

the banker, without any special authority, receives rent accruing after the expiration of the notice to quit, it will not so operate.¹ Nor is a promise not to turn the tenant out of the farm unless it should be sold, given after notice to quit, a waiver.² The mere acceptance of money by a landlord, for occupation subsequent to the time when a tenant ought to have quit the premises, according to the notice given him for that purpose, or a demand of rent which accrued subsequent to that time, are neither of them a waiver of such notice on the landlord's part, but matter of evidence only, whence a waiver may or may not, according to circumstances, be inferred. In all cases it is for a jury to determine whether the money paid was received as rent or not. And whether it amounts to a waiver of notice or not depends upon the intention of the parties, which is also a matter of fact to be left to a jury.³

§ 486. Subsequent Notice generally a Waiver. — The notice may also be waived by giving a subsequent notice to the

¹ Doe *v.* Calvert, 2 Camp. 387.

² Whiteacre *v.* Symonds, 10 East, 13; Doe *v.* Humphreys, 2 *id.* 237.

³ Doe *v.* Pritchard, 5 B. & Ad. 780; Fitzpatrick *v.* Child, 2 Brewst. 365. But if it merely appears that rent was paid and was taken by lessor under protest, it is a waiver at law, and not a question for the jury; for the lessor's act contradicts and controls his words. Croft *v.* Lumley, 5 Ellis & B. 648, 682; and Ellis, B. & E. 1069, where this was determined in the House of Lords by seven judges to three, after most elaborate consideration. So Dendy *v.* Nicholl, 4 C. B. n. s. 376, 379; and the doctrine of Doe *v.* Batten, Cowp. 243, that acceptance of rent as such, which accrues after expiring of notice to quit, was no waiver, but only a question for the jury, was overruled; as it had already been shaken by Goodright *v.* Cordwent, 6 T. R. 219. In Massachusetts a forfeiture of the tenant's estate created by a written lease, after notice to quit, is avoided if the tenant, four days at least before the return day of process, pays the accrued rent and costs. Pub. Sts. c. 121, § 11. And in order to prevent a forfeiture in such a case the lessee is not obliged to tender the taxes due on the estate which the lessor has paid to prevent the estate being sold for taxes, although the lease contains a covenant that the lessee shall pay the taxes, this being a separate and independent covenant. But the statute has no application where, as in Kimball *v.* Rowland, 6 Gray, 224, the tenancy is at will merely, and so terminable by a reasonable notice. Hodgkins *v.* Price, 137 Mass. 13.

same effect; because the latter notice is an acknowledgment that the tenancy still subsists after the expiration of the notice first served.¹ But if it is manifest that the second notice to quit is not intended as a waiver of the first, it will not so operate. As, where a second notice was given after the expiration of the first notice, and after the commencement of an ejectment suit, in which the landlord continued to proceed, notwithstanding his second notice, it was held to be no waiver of the original notice; because it was impossible for the tenant to suppose that the landlord meant to waive a notice, upon the foundation of which he was proceeding to turn him out of the premises. The party giving a subsequent notice may also express his intention that it shall not operate as a waiver of his first notice, and then the first notice will stand good.² So where, after the expiration of a notice to quit, the landlord gave the defendant a fresh notice that unless he quit in fourteen days, he would be required to pay double rent, Lord Ellenborough held there was no waiver of the first notice.³ A tenant who held under a demise from the 26th day of March, for one year thence next ensuing, and so from year to year, for so long as the landlord and tenant should respectively please, after having held more than a year,

¹ Doe *v.* Palmer, 16 East, 53.

² Doe *v.* Humphreys, 2 East, 237. In an action, however, for double rent, the defendant was tenant to the plaintiff under a demise for three years, from Whitsuntide, 1781. Two months previously to Whitsuntide, 1784, plaintiff gave him notice to quit at that time. After the expiration of the notice, on 3d June, 1784, the plaintiff gave him another notice to quit at Martinmas following, or pay double rent. It was held by Lord Mansfield that the first notice was not waived by the second; for that, when a term is to end on a precise day, there is no occasion for a notice to quit; that here it ended at Whitsuntide; that the meaning of the first notice was that if the tenant did not quit, the landlord would insist on double rent, and the second notice only expressed what was meant by the first. Messenger *v.* Armstrong, 1 T. R. 53.

³ Doe *v.* Steel, 3 Camp. 117; Doe *v.* Inglis, 3 Taunt. 54. So, where the second notice was only to pay increased rent, it was held no waiver. O'Neill *v.* Cahill, 2 Brewst. 357. And where a lessor by mistake gave a formal notice to a tenant at sufferance, he was held not thereby to have waived his right to give a summary notice. Melley *v.* Casey, 99 Mass. 241.

gave notice (which was less than six months before the 26th day of March) that he would quit on that day, and the landlord assented to the notice ; it was held that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law.¹

§ 487. Determines Tenant's Estate absolutely. — At the expiration of the time specified in the notice to quit, the landlord is in precisely the same situation as he would have been at the end of the year if the tenancy had been expressly for a year ; and he may at once proceed to take possession, or if necessary commence an action for the recovery of the premises.² If, however, he omits to commence proceedings to eject the tenant for any considerable space of time after the period limited by his notice, or if he again collects rent which accrued subsequently thereto, he must give fresh notice before he can take proceedings to dispossess the tenant ; for the expiration of the notice is equivalent to the expiration of the lease, and after that time, a new tenancy from year to year will be deemed to have commenced.³

¹ *Johnstone v. Huddlestone*, 4 B. & C. 922. Where a landlord, about to sell his premises, gave notice to the tenant to quit on the 11th of October, 1806, but promised him not to turn him off unless they were sold, and, not being sold until February, 1807, the tenant refused, on demand, to deliver possession,—on ejectment, the court held that the promise, which was performed, was no waiver of the notice, nor operated as a license to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand after the sale, was a trespasser from the expiration of the notice to quit. *Whiteacre v. Symonds*, 10 East, 13; *Doe v. Sayer*, 3 Camp. 8; *Doe v. Miller*, 2 C. & P. 348.

² *Doe v. Miller*, *supra*.

³ *Rowan v. Lytle*, 11 Wend. 616; *Vance v. Vance*, 5 Ir. R. C. L. 363; *Oakley v. Monk*, L. R. 1 Exch. 159, *ante*, § 58.

SECTION III.

BY FORFEITURE.

§ 488. **Incurred, anciently, at Common Law, when.** — The relation of landlord and tenant will also be dissolved when the tenant incurs a *forfeiture* of his lease, in consequence of the breach of some condition therein contained, and the landlord re-enters upon the premises, or signifies his intention to treat the lease as void, if it is so expressed in the lease.¹ At common law, if a tenant does any act inconsistent with his character as a tenant, — as, if he impugns the title of his lessor, affirming, by matter of record or otherwise, the fee to be in a stranger; claims a greater estate than he is entitled to; refuses to pay rent and attorns to a stranger; or alienes the estate in fee, by any mode of conveyance which has the effect of divesting the estate of the reversioner, as by a feoffment, or other common-law conveyance, — a forfeiture will be incurred, and the landlord may re-enter, and resume the possession of his premises.² But now the attempt to convey a greater estate than can be lawfully conveyed produces no such result, and as to other grounds of forfeiture, usually implied from acts of disclaimer, they will be considered in a later portion of our work.³

§ 489. **Incurred by Breach of Stipulation, when.** — The forfeiture of a term generally occurs in consequence of a breach of some stipulation contained in the contract under which the tenant occupies the premises. But the common-law doctrine of forfeiture, founded on strict feudal principles, appears

¹ *Post*, § 492.

² Co. Lit. 251, b; *Read v. Erington*, Cro. El. 321; *Fenn v. Smart*, 12 East, 444; *Goodwright v. Davids*, Cowp. 803; *Commonwealth v. Welcome*, 5 Dane, Abr. 13. In Rhode Island, by statute, a tenant who allows his rent to remain in arrear more than fifteen days after demand therefor is not entitled to notice to quit, and is in the condition of a tenant who has incurred a forfeiture, and is liable to be re-entered upon immediately without notice. *Providence County Sav. Bk. v. Phalen*, 12 R. I. 495.

³ *Post*, § 522; *Grant v. Townsend*, 2 Hill, 554.

to be not only inapplicable to the present state of society, but unjust in many respects; for which reasons courts of law are found to be averse to enforcing it in its original strictness. Hence a default in the payment of rent, where there is a covenant in the lease for its payment, but no condition providing for a re-entry in case of the default, does not work a forfeiture of the term. For the same reason, a stipulation giving a power of re-entry to the landlord for the breach of any other covenant is strictly construed; and in order to enforce it, there must not only be such a breach shown as it was the clear and manifest intention of the parties to provide for, but the landlord must show that he has done everything required on his part to perfect his right to enter.¹ And

¹ *Baxter v. Lansing*, 7 Paige, 350; *Doe v. Bond*, 5 B. & C. 855; *Clark v. Jones*, 1 Den. 516; *Lewis v. St. Louis*, 69 Mo. 595; *Meni v. Rathbone*, 21 Ind. 454; *Brown v. Bragg*, 22 *id.* 122. But the mere fact that the conditions of the lease are harsh will not prevent a forfeiture. *Patton v. Bond*, 50 Iowa, 508. Where the forfeiture was to be at the landlord's option it was held that the option must be exercised, if at all, within a reasonable time. *Catlin v. Wright*, 13 Neb. 558. Generally, when a penalty as well as a re-entry is given for the non-performance of a condition, the forfeiture cannot be taken advantage of without a demand at the time fixed. *Chapman v. Wright*, 20 Ill. 125. And upon such demand, the landlord's silence as to a proposition for settlement made by the tenant, and a delay for thirty days thereafter in enforcing the forfeiture has been held a waiver. *Johnson v. Douglass*, 73 Mo. 168. And in ejectment for a forfeiture for a sale without license, the landlord must show that there was no such license given. *Toleman v. Portbury*, L. R. 5 Q. B. 288. But where, besides a general clause of re-entry, it was provided that the buildings were to be security for the rent, it was held that this did not prevent a re-entry for non-payment of the rent. *Brand v. Frumveller*, 32 Mich. 215. An interpretation which creates a forfeiture is not to be favored: *Jackson v. Topping*, 1 Wend. 388; and statutes creating penalties and forfeitures are to receive a strict construction: *Hasbrook v. Paddock*, 1 Barb. 635. Equity does not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture. *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Linden v. Hepburn*, 3 Sandf. 668. Equity, it is said, abhors a forfeiture, *Munroe v. Armstrong*, 96 Pa. St. 307; and see *Estabrook v. Hughes*, 8 Neb. 496. But not when the enforcement of the forfeiture will work equity, as where it will protect the landlord from the laches of a lessee whose lease is of no value until developed. *Munroe v. Armstrong*, *supra*. Where, by the terms of a statute, a forfeiture is to attach, upon the commission of some illegal act, the title of the owner of

where a lease contained a proviso for re-entry, if the tenant should make default in the *performance* of any of the covenants therein contained, it was held to extend only to affirmative covenants, and not to those of a negative character, for they were not to be performed.¹ And where a term is to become void for the breach of a covenant "at the lessor's option," a breach does not work a forfeiture, without some act on the part of the lessor declaring it, or claiming it.² So also where a lessee covenanted to pay the rent, and not to assign without leave of the lessor, and there was a proviso for re-entry if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained, on the part of the lessee, should be broken, but there was, in fact, no covenant on the part of the lessee contained in the lease, subsequent to the proviso, the court held that the lessor could not re-enter upon a breach of the covenant not to assign, for the proviso was restrained, by the word *hereinafter*, to subsequent covenants; and, although there were none, the court would not reject that word.³ And a proviso that the lessee shall not "do, or cause to be done, any act, matter, or thing, contrary to and in breach of any of the covenants," has been held not to apply to the breach of a covenant to repair,—the omission to repair not being an act done within the meaning of the proviso.⁴ But the general rule now observed seems

the property is from that time wholly divested. *Wilkins v. Despard*, 5 T. R. 112; *U. S. v. Grundy*, 3 Cranch, 337; *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Bennett v. Am. Art. Union*, 5 Sandf. 614.

¹ *Doe v. Marchetti*, 1 B. & Ad. 715. But a covenant not to underlet, on penalty of forfeiture and damages, was held to intend a forfeiture of the term and estate. *Lynde v. Hough*, 27 Barb. 415; *Co. Lit.* 204, a.

² *Walker v. Engler*, 30 Mo. 130.

³ *Doe v. Godwin*, 4 M. & S. 265. Where a lease provides that if the rent be not paid at the day appointed, it may be recovered in an action of debt, the language used precludes the idea of a forfeiture. *Delancy v. Ganong*, 9 N. Y. 9. So *Burnes v. McCubbin*, 3 Kansas, 221; a proviso of forfeiture on non-payment of rent or taxes as covenanted does not extend by implication to a further covenant not to assign without permission.

⁴ *Doe v. Stevens*, 3 B. & Ad. 299. A New York statute provides that a diversion of the salt-works, which are farmed out by the State to other purposes than the manufacture of salt, shall work a forfeiture of the leasehold estate; and upon this statute it has been decided that the diversion,

to be, while requiring all the formalities stipulated for to be strictly observed,¹ to construe the language of *express* conditions like that of any agreements into which parties have entered, and if definite, to give it its proper force.²

§ 490. Re-entry for Waste. — Where a right of re-entry is reserved in case the lessee commits waste, it is generally construed to mean such waste as will be injurious to the reversion, and not merely such as might be given in evidence under the old writ of waste, unless there be some stipulation in the lease to the contrary. And therefore where a lease contained a proviso for re-entry if the lessee should commit waste to the value of ten shillings, and the lessee having pulled down some old buildings of more than that value, and substituted others of a different description, the lessor brought his action of ejectment for a forfeiture,— it was held that the waste contemplated by the proviso was waste producing injury to the reversion, and that it was a question for a jury, under all the circumstances, whether such an injury to the value of ten shillings had been committed.³ It has been held, also, in

to cause a forfeiture, must be a diversion of the whole, and that building a dwelling-house on a portion of the premises would not cause a forfeiture. *Hasbrook v. Paddock*, 1 Barb. 635; and see *ante*, § 405 *et seq.*, for other instances.

¹ *Chapman v. Harney*, 100 Mass. 353.

² Thus, see *Whitwell v. Harris*, 106 Mass. 532, *post*, § 490, and note; *Miller v. Havens*, 51 Mich. 482; *Doe v. Jepson*, 3 B. & Ad. 402; *Wheeler v. Earle*, 5 Cush. 31; *Wadham v. Postm. Gen.*, L. R. 6 Q. B. 644, where negative covenants were included; *Pond v. Holbrook*, 32 Minn. 291; *Brooks v. Drysdale*, 3 C. P. D. 52; *Weston v. Managers, &c.*, 8 Q. B. D. 387; *s. c. on app.* 9 *id.* 404. In the latter case the lessee had covenanted against carrying on offensive trades, with clause of re-entry in case of breach. The lease also provided for an extra rental in case the offensive trades covenanted not to be carried on should be carried on. It was held that the lease could not be construed as meaning that the lessee was entitled to carry on such trade upon payment of the extra rental, and that the lessor was entitled to re-enter for breach of covenant, since the additional rent must be treated as a penal rent, but not as showing that the carrying on of the trades in question is not a breach of covenant.

³ *Doe v. Bond*, 5 B. & C. 855. A lessee covenanted not to build on the demised premises, without the consent of the lessor, any dwelling-house, cabin, farm or other building, with a clause of re-entry on breach,

New York, that the whole of the demised property is not forfeited under such circumstances, but only so much thereof as waste may have been committed upon.¹

§ 491. Of Whole Estate, notwithstanding Severance of Occupation.—A condition being indivisible, the conditions of a lease do not become severed by a severance in the occupation of the premises, and a payment of rent to the lessor by the respective occupants, for the portions occupied by each. Hence, if either a lessee or an assignee of a portion of the premises commits any act which, by the terms of the lease, creates a forfeiture of the estate, the forfeiture attaches to the whole of the premises embraced in the lease.² As, where a lease contained a covenant, on the part of the lessee, that he would not cut or destroy any part of the timber or wood growing on the demised premises, except for making or repairing buildings to be erected on the land, and for necessary fencing and fuel for one dwelling-house, with a clause of re-entry by the lessor for a breach of any of the covenants by the lessee; and it was proved in an action of ejectment brought by the lessor against the lessee that the latter had cut trees and timbers for purposes not authorized by the lease,—it was held that the lessee could not escape the consequences of the forfeiture incurred by such act, on the ground that he had procured his firewood and fencing-timber from other land, and that he had not withdrawn from the demised premises more wood than the lease authorized him to take, although he had used it for other purposes.³

and afterwards without the lessor's consent added to the dwelling-house then on the premises a building containing several apartments communicating with the original dwelling-house, and used together with it by the occupier as one entire dwelling-house; and it was held that the erection of the additional structure without consent occasioned a forfeiture of the lease. *Domvile v. Colville*, 7 Ir. R. C. L. 68.

¹ *Jackson v. Tibbitts*, 3 Wend. 341. But a condition of forfeiture if any alteration or addition is made, is broken by covering the back yard with a wooden roof and sides resting on already existing walls, and not touching the ground. *Whitwell v. Harris*, 108 Mass. 532.

² *Eyton v. Jones*, 21 L. T. n. s. 789.

³ *Clarke v. Cummings*, 5 Barb. 339; *Jackson v. Brownson*, 7 Johns. 227. An estate is forfeited for the non-performance of a condition by a

§ 492. **Who may re-enter.** — **Right Optional.** — **Tenant's Estate subsists till Re-entry.** — Not only may the lessor re-enter for a forfeiture, but his heir or executor may also re-enter, when entitled to the reversion; and we have seen when an assignee of the reversion may enter for a condition broken. But it is entirely optional with the lessor whether he will avail himself of this right of re-entry or not, although, by the terms of the proviso, the term is to cease, or become void, for the non-performance of the covenants; and if the lessor does not avail himself of it, the term will continue, for the lessee cannot elect that it shall cease or be void.¹ There was, however, a distinction formerly drawn between leases that were declared to be void upon a breach of condition, and such as were voidable only. In the case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although, by its express terms, it was to become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or of some other act, which amounted to a dispensation of the forfeiture. But, upon the breach of such a condition in a lease for years, the lease became *ipso facto* void, and no subsequent recognition could set it up again. Yet if the condition, in such case, was merely that the lessor might re-enter, the lease was voidable

grantee, though the grantee was under disability, as, for example, a married woman. *Garrett v. Scouten*, 3 Den. 334; 4 Kent, Com. 125; Co. Lit. 246, b.

¹ *Arnsby v. Woodward*, 6 B. & C. 519; *Rede v. Farr*, 6 M. & S. 121. Where there is a proviso in a lease that on non-payment of rent the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach made. *Reid v. Parsons*, 2 Chit. 247. When the lessor has remained in possession of the premises it is held to be unnecessary for him to re-enter or give any notice of his intention to enforce the forfeiture; and that even if any overt act or notice is required, the execution and delivery by the lessor of a new lease to a third party is sufficient notice of the lessor's intention to enforce the forfeiture. *Alleghany Oil Co. v. Bradford Oil Co.*, 20 Hun, 26. It is held that the right of re-entry for breach of a covenant is not such an adequate remedy as to deprive the lessor of his right to an injunction to restrain such breach, even although his lease stipulates that such re-entry shall not work forfeiture of future rents; unless it also provides that the lessor shall not be held to account for the possession after the re-entry. *Stees v. Kranz*, 32 Minn. 313.

only, and might be affirmed by an acceptance of rent, if the lessor had notice of the breach at the time.¹ But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition, making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege.² The English law in this respect has been generally followed in this country, and such a lease is therefore held good until avoided, though the lessee is estopped to set it up against the lessor.³

§ 493. For Non-payment of Rent.—Demand a Pre-requisite to, at Common Law. —At common law, when a forfeiture was

¹ *Jackson v. Andrew*, 18 Johns. 431; *Co. Lit.* 215, a; *Pennant's Case*, 3 Co. 64, a; *Duppa v. Mayo*, 1 Saund. 287, b; *Chalker v. Chalker*, 1 Conn. 79.

² *Doe v. Bancks*, 4 B. & Ad. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Arnsby v. Woodward*, *supra*; *Doe v. Birch*, 1 M. & W. 402; *Hughes v. Palmer*, 19 C. B. n. s. 393, 405-407; *Porter v. Merrill*, 124 Mass. 534.

³ The old law is still followed in Pennsylvania: *Kenrick v. Smith*, 7 W. & S. 41; *Davis v. Moss*, 38 Pa. St. 346, 353; and in some cases in New York: see per *Paige*, J., *Parmelee v. Oswego & S. R. R.*, 6 N. Y. 74, 80; followed by *Gardner v. Hannah*, 6 Duer, 262; *Beach v. Nixon*, 9 N. Y. 35. But the law seems otherwise to have been settled in accordance with the text. *Clark v. Jones*, 1 Den. 516; *Roberts v. Geis*, 2 Daly, 535; *Ludlow v. N. Y. & H. R. R.*, 12 Barb. 440; *Phelps v. Chesson*, 12 Ired. 194; *Cartwright v. Gardner*, 5 *Cush.* 281; *Bowman v. Foot*, 29 Conn. 331; *Read v. Tuttle*, 35 *id.* 25; *Dermott v. Wallace*, 1 Wall. 64, 65. Though where the lease is to terminate on a sale by lessor, it becomes absolutely void thereby. *Morton v. Weir*, 70 N. Y. 247. The doctrine is sometimes stated that the lease is void as to the lessee, but voidable as to the lessor, which is objectionable as likely to mislead. *Clark v. Jones*, *supra*. If it were *void*, the lessee would have no title against any one; but the contrary was determined in *Roberts v. Davey*, *supra*. So in *Blyth v. Dennet*, 13 C. B. 178, 180, it is said by Maule, J.: "In case of a forfeiture, the estate continues, though voidable." So *Woodfall, Landl. & T.* (9th ed.) 286, 664; 1 *Smith, Lead. Ca.* 90. The lease is, therefore, void only if the lessor so declares; the lessee being merely estopped to set it up. Of course where the proviso is that the lease shall be void and the lessor re-enter, it is only voidable by re-entry. *Doe v. Birch*, 1 M. & W. 402; *Dakin v. Cope*, 2 Russ. 170; *Hayne v. Cummings*, 16 C. B. n. s. 421; *Garnhart v. Finney*, 40 Mo. 449, 460; *Rogers v. Snow*, 118 Mass. 118; *Bemis v. Wilder*, 100 *id.* 416, 447.

sought to be enforced for the non-payment of rent, no distinction was made between cases where there was a sufficient distress upon the premises, and where there was not.¹ In every case, before a landlord could enter for the non-payment of rent, he must have made a formal demand of the precise *sum due* for the last current quarter, and if the demand included any portion of the rent of a previous quarter, it would have been bad.² It must also have been made on the day it became due or legally demandable;³ at a convenient time before sunset;⁴ at the place where, by the terms of the lease, it was made payable; or, if there was no place mentioned in the lease, at the most notorious place upon the demised premises, which, if there be a dwelling-house, is the front door.⁵ But the lessee might seek the lessor at any time

¹ It is held that where the lessor by the terms of the lease may distrain either for rent or taxes in arrear, and may re-enter and terminate the lease in case of failure to pay such rent or taxes, he has the right to distrain for rent and at the same time to re-enter and terminate the lease for unpaid taxes. *Becker v. Werner*, 98 Pa. St. 555.

² *Doe v. Paul*, 3 C. & P. 613; *Van Rensselaer v. Jewett*, 2 N. Y. 147; *Miller v. Sparks*, 4 Col. 303. But the demand may include interest to date. *People v. Dudley*, 58 N. Y. 323.

³ *Smith v. Whitbeck*, 13 Ohio St. 471; *Gaskill v. Trainer*, 3 Cal. 334; *Jenkins v. Jenkins*, 63 Ind. 415. Although the lease contains a proviso that the lessor may re-enter if the rent remains unpaid for twenty-eight days after quarter-day; for the proviso for recovery by prosecution, distress, or re-entry for want of distress, does not extend the time of payment. *Van Rensselaer v. Jewett*, *supra*.

⁴ *Jackson v. Harrison*, 17 Johns. 66; *Duppa v. Mayo*, 1 Saund. 287. For the very primitive reason that the tenant may have light to count the money.

⁵ *Connor v. Bradley*, 1 How. U. S. 211; *Van Rensselaer v. Snyder*, 9 Barb. 302; s. c. 13 N. Y. 299; *Jones v. Reed*, 15 *id.* 68; *Clun's Case*, 10 Co. 129, a; *Smith & Bustard's Case*, 1 Leon. 141; *Fabian v. Winston, Cro. El.* 209; *Duppa v. Mayo*, *supra*. And there must be such a demand on the premises, even where the rent is payable at another place than the premises. *Van Rensselaer v. Jewett*, *supra*; *Borough's Case*, 4 Co. 73, a. In respect to service reserved, if the lease does not fix any place of performance, it is not necessarily upon the demised premises, but the landlord may designate any reasonable place. *Van Rensselaer v. Jones*, 5 Den. 449. Where a condition of forfeiture for non-payment of rent is given by the lease, and the requirements of a common-law demand are not expressly waived, they are still insisted on in a proceeding to enforce

during the natural day, that is, before twelve at night of the day on which the rent becomes due, and make a personal tender of the rent, in order to save the forfeiture.¹ If the rent was payable at any specified place, the tender must have been made at that place;² but if no place was mentioned, it was enough that the lessee was upon the land with the money, or the specific articles (if the rent was payable in kind), ready to pay if demanded.³

§ 494. Demand, how far necessary in different States. — The same strict proof of demand is still required of a landlord who re-enters for a forfeiture for non-payment of rent, where there are sufficient goods upon the demised premises, from which he might have realized his rent by a distress if he had thought proper; or where the relation of landlord and tenant the forfeiture. Thus in Connecticut: *Bowman v. Foot*, *supra*; Ohio: *Smith v. Whitbeck*, *supra*; Kentucky: *Proctor v. Keith*, 12 Ky. 252; California: *O'Connor v. Kelley*, 41 Cal. 432; Illinois: *Chapman v. Kirby*, 49 Ill. 211; Indiana: *Bacon v. W. Furn. Co.*, 53 Ind. 229; as well as in Massachusetts and New York, cases *supra*; and *Chapman v. Harney*, 100 Mass. 353. In Louisiana, however, they seem dispensed with: *Hyde v. Palmer*, 12 La. 359. And where the lease gave a right of re-entry in twenty-one days after the rent shall become due, being demanded, it was held that a demand should be made at the end of the twenty-one days, but not the strict common-law demand. *Phillips v. Bridge*, L. R. 9 C. P. 48.

¹ *Burrough v. Taylor*, Cro. El. 462. A lease for years contained a covenant to pay rent, and a proviso for re-entry on non-payment, "the rent being first lawfully demanded." The property being vacant, the landlord asked for payment of the rent from the person liable to pay it, and not receiving it, re-entered. Held, that there had been a sufficient demand, and that the lease was effectually determined. *Manser v. Dix*, 8 De Gex, M. & G. 703.

² *Lush v. Druse*, 4 Wend. 313; *Remsen v. Conklin*, 18 Johns. 450; *Acad. of Music v. Hackett*, 2 Hilt. 217. A waiver of a demand will never be implied to aid a forfeiture. *Gaskill v. Trainer*, *supra*.

³ *Walter v. Dewey*, 16 Johns. 222; 3 Kent, Com. 468. In order to obviate some of these difficulties, the parties sometimes inserted in the condition of the lease terms expressly dispensing with a formal demand of the rent, and such dispensation was held operative. *Doe v. Masters*, 2 B. & C. 490. Thus, where the stipulation was that the lease should end without further notice or demand, it was held that no demand was necessary. *Sweeney v. Garrett*, 2 Disney, 601; *Fifty Assoc. v. Howland*, 5 *Cush.* 214.

subsists by mere operation of law, and the statute authorizing summary proceedings to take possession after the non-payment of rent cannot be resorted to.¹ The statutes of some of the States have substituted the service of a declaration in ejectment for a formal demand of rent, in cases where a half-year's rent is due, and no sufficient distress can be found upon the premises to satisfy the rent.² And a recent statute of New York, abolishing distress for rent, not only dispenses with the formality of a demand, but gives a right of re-entry, in case of forfeiture for the non-payment of rent, after the service of fifteen days' notice to quit, in writing, upon the tenant, whether there be sufficient goods upon the premises or not.³ Similar statutes exist in Illinois and California, and perhaps in other States.⁴ It is to be observed, however, that this right of re-entry, constituting a forfeiture for the non-payment of rent, cannot exist except where it is expressly so stipulated in the lease;⁵ and also that after a landlord has re-entered

¹ *Van Rensselaer v. Jewett*, 2 N. Y. 147. It was essential to these proceedings that no sufficient distress can be found on the premises. *Doe v. Fuchau*, 15 East, 286. Every part of the premises should be searched. *Powell v. King*, in *Smith v. Doe*, 2 Br. & B. 514. The goods, however, must be so visibly on the premises that a broker, going to distrain, and using reasonable diligence, would find them. *Doe v. Franks*, 2 Car. & K. 678. If the tenant locks up his doors, so that the landlord cannot enter upon the premises to distrain, proof of this fact is enough, without showing that no sufficient distress was on the premises. *Doe v. Dyson, Mood. & M.* 77. And it was at one time thought that where more than half a year's rent was due, it was not enough to show that there was no distress sufficient to satisfy the whole arrears due. *Dow v. Rowe*, 9 Dowl. 548. But this has since been held not to be the true construction of the statute. *Cross v. Jordan*, 8 Exch. 149.

² 2 R. S. 505, § 30; 4 Geo. II. c. 28.

³ Laws of 1846, c. 274, p. 369; *Van Rensselaer v. Ball*, 19 N. Y. 100; *ante*, §§ 301, 302.

⁴ Thus, in the former State, by the act of 1865, the lessor may have a summary proceeding to recover the premises ten days after demand, and this demand may be made at any time, though it must otherwise conform to the requirements of the common law. *Woodward v. Cone*, 73 Ill. 241; *Burt v. French*, 70 *id.* 254. So in California, by Acts of 1863, p. 586, upon fifteen days' notice. *O'Connor v. Kelley*, 41 Cal. 432; *Gage v. Bates*, 40 *id.* 254. See also Mass. Gen. Stat. c. 90, § 30.

⁵ *Van Rensselaer v. Jewett*, *supra*. But see *Horton v. N. Y. Cent. &c. R. R.*, 12 Abb. N. C. 30, where it is held that a clause in a lease

and so disaffirmed the lease, there can be no recovery of subsequently accruing rent.¹

§ 495. **Tenant's Equitable Relief against Re-entry.**— When a tenant has forfeited his lease by a breach of the covenant for the payment of rent, courts, both of law and equity, consider the clause of re-entry to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common-law demand may have been complied with, upon his satisfying the rent due, and making compensation for any damages which the landlord may have sustained in consequence of this omission.² And, in general, a court of equity will relieve the tenant from a forfeiture, where the breach is the result of accident or mistake; or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding payment.³ A similar relief is given by statute in some States in cases of forfeiture for non-payment of rent.⁴ It would

providing for its termination at the lessor's election on default of rent, although in the form of a mere stipulation or contract, is still a condition, since it provides for ending the term, and forfeiture of the estate in case of a default; and the dictum *contra* in *Van Rensselaer v. Jewett* is disapproved as being based on *Kenege v. Elliott*, 9 Watts, 258, which case is distinguished.

¹ *Hall v. Gould*, 3 N. Y. 127; *Stuyvesant v. Davis*, 9 Paige, 427.

² *Phillips v. Doelittle*, 8 Mod. 345; *Goodright v. Noright*, 2 W. Bl. 746; *Baxter v. Lansing*, 7 Paige, 350; *Story*, Eq. § 1314; *Hill v. Barclay*, 16 Ves. 402, 405; *Lovat v. Ranelagh*, 3 Ves. & B. 24; *Wilson v. Jones*, 1 Bush, 173. The same power was exercised at law in *Atkins v. Chilson*, 11 Met. 112.

³ *Jackson v. Brownson*, 7 Johns. 235; *Nelson v. Carrington*, 4 Munf. 332; *Garner v. Hannah*, 6 Duer, 262; *Bracebridge v. Buckley*, 2 Price, 200. Thus, non-payment of taxes is a money forfeiture and relievable. *Giles v. Austin*, 62 N. Y. 486. So see *Hagar v. Buck*, 44 Vt. 285; *post*, § 496, note. But courts of equity will not relieve against a forfeiture decreed by the legislature. *Carondelet v. Wolfert*, 39 Mo. 305.

⁴ By N. Y. R. S. 505, 533, tenant may tender to the landlord within six months after his recovery in ejectment, all rent due and costs. By the New York Code of Procedure, § 452, judgment of forfeiture and eviction shall only be given in favor of a person entitled to the reversion

seem, however, that the actual tender or payment of money may, in some cases, be dispensed with; for, in a case where there had been various dealings between a landlord and his tenant, so as to produce an account too complicated to be taken at law, and the landlord brought an ejectment for the non-payment of rent, and the tenant filed a bill for an account upon those dealings, and to have the balance applied to the liquidation of the rent due, it has been held that, upon such a bill, there was no necessity for the tenant to bring the rent into court.¹ But if the question whether rent be due or not is not too complex to be tried at law, and there is no occasion for a bill of account, the tenant will not be restored to possession without paying the money into court.²

§ 496. Equitable Relief to Tenant, when refused.—The doctrine of compensation will not apply in any case where the landlord's damages are not a mere matter of computation; and, therefore, if it is stipulated in a lease that the lessor shall re-enter in case the lessee makes an assignment without permission of the landlord, the breach of such an agreement is a cause of forfeiture, against which the court will not grant relief.³ Or if a tenant, being under a covenant to keep the premises insured, neglects to do so, and, by the terms of the lease, such neglect or refusal is to operate as a forfeiture, a court of equity will not interfere; for, as it is impossible to estimate in damages the amount of risk run by not insuring, the effect of giving relief in such a case would be that a tenant might break this covenant with impunity, and every landlord must take his tenant for insurer, for want of power to enforce his covenant.⁴ The same principles apply to cases against the tenant in possession when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

¹ *O'Connor v. Spaight*, 1 Sch. & L. 305; *Beasley v. Davey*, 2 *id.* 403.

² *O'Mahony v. Dickson*, 2 Sch. & L. 400.

³ *Lovat v. Ranelagh*, 3 Ves. & B. 29–31; *Sanders v. Pope*, 12 Ves. 291; *Davies v. Moreton*, 2 Ca. in Ch. 127.

⁴ *Rolfe v. Harris*, 2 Price, 206, n.; *Reynolds v. Pitt*, 19 Ves. 134; *White v. Warner*, 2 Mer. 459; *Green v. Bridges*, 4 Sim. 96; *Thomson v. Guyon*, 5 *id.* 65. But if the premises are uninsured for a short time, the

where the tenant neglects to repair;¹ has made a way through the premises, contrary to his express covenant;² exercises a forbidden trade;³ or cultivates the land in a manner prohibited by the lease.⁴ But courts of equity are only closed against a tenant where the forfeiture is incurred by his wilful and culpable neglect to fulfil the terms of his covenant, and not in cases where the omission has been occasioned by inevitable accident.⁵ And the general rule to be applied to all such cases seems to be, that courts of equity will relieve where the omission and consequent forfeiture are the result of mistake or *accident*, and the injury and inconvenience arising from it capable of compensation;⁶ but where the transgression is wilful, or the compensation impracticable, they invariably refuse to interfere.⁷

lessor will not be allowed to enforce a forfeiture for a breach of this covenant, if by his own conduct he had induced the lessee to believe the premises had been insured by himself. *Doe v. Sutton*, 9 C. & P. 706. The strictness of this doctrine is also relaxed in cases where a delay to insure is properly explained, or shown to be reasonable. *Doe v. Ulph*, 13 Q. B. 204.

¹ *Hill v. Barclay*, 16 Ves. 402; s. c. 18 *id.* 56. But where the lessor's conduct has misled the lessee into supposing the covenant was not to be insisted on, equity will relieve. *Hughes v. Metro. R. R.*, 1 L. R. C. P. Div. 120. And such relief has even been afforded where there is an imperfect but honest compliance with the requirements of the covenant. *Bryant v. Thompson*, 4 Giff. 473. But where there is negligence, whether on the part of the lessor or any one working for him, equity will not relieve. *Gregory v. Wilson*, 9 Hare, 683; *Nokes v. Gibben*, 3 Drew. 681. But where besides tenant's covenant to build on the premises and keep in repair, for breach whereof landlord had entered, there was a covenant by lessor to convey for a fixed sum during the term, it was held that the tenant could enforce this notwithstanding his forfeiture, as this was a clear sum due after paying all rent due. *Hagar v. Buck*, 44 Vt. 285.

² *Descarlett v. Dennett*, 9 Mod. 22.

³ *Macher v. Foundl. Hosp.*, 1 Ves. & B. 188; *Wafer v. Mocato*, 9 Mod. 112.

⁴ *Lovat v. Ranelagh*, 3 Ves. & B. 29.

⁵ See *Gregory v. Wilson*, *Nokes v. Gibben*, *supra*.

⁶ *Baxter v. Lansing*, 7 Paige, 350.

⁷ *Davies v. Moreton*, 2 Ca. in Ch. 127; *Rolfe v. Harris*, *supra*; *Cage v. Russell*, 2 Vent. 352.

§ 497. **Waiver of Forfeiture by Acceptance of Rent.**—The ordinary waiver of a forfeiture occurs by an acceptance of rent which became due after a breach committed by the tenant, or by distraining therefor.¹ And this result follows, without reference to the amount of rent received, or to the sufficiency of the distress.² But to make it a waiver, it is necessary that the landlord, at the time of accepting the rent, shall have knowledge of the fact that the condition has been broken.³ If, with this knowledge, he receives rent which has accrued subsequent to a breach of the condition, he again consents to and establishes the tenancy, which it was competent for him to have avoided; and he thereby precludes himself from taking advantage of the tenant's misconduct.⁴ Thus, if

¹ *Newman v. Rutter*, 8 Watts, 51; *Jackson v. Sheldon*, 5 Cow. 448; *Bleecker v. Smith*, 13 Wend. 530; *Doe v. Rees*, 4 Bing. N. C. 384; *Doe v. Ward*, 1 Stark. 411; *Doe v. Batten*, Cowp. 247; *Gomber v. Hackett*, 6 Wisc. 323; *Price v. Worwood*, 4 Hurlst. & N. 512. The acceptance of rent, of course, only affirms the tenancy during that period in respect to which the rent was paid; and therefore the landlord may receive any rent which became due before the alleged forfeiture, or indeed up to the day of such forfeiture, or may bring an action to recover it, without waiving the forfeiture. It is only by receiving or claiming rent due since the forfeiture that it is waived. See *Pennant's Case*, 3 Co. 64, b; *Jackson v. Allen*, 3 Cow. 220; *Hunter v. Osterhoudt*, 11 Barb. 33; *Bleecker v. Smith*, *supra*; *Toleman v. Portbury*, L. R. 7 Q. B. 344; *Campbell v. McElevy*, 2 Disney, 574, 583; *Manice v. Millen*, 26 Barb. 42; *Conger v. Duryee*, 24 Hun, 617, 90 N. Y. 594, where the rule is applied to the case of a breach of covenant to pay taxes. In *Coon v. Brickett*, 2 N. H. 163, acceptance after forfeiture, of rent accrued at any time, was held to waive, but this is clearly not law. In *Bacon v. West. Tr. Co.*, 53 Ind. 229, it is said "to insist on a forfeiture of the lease for non-payment of the rent which he has received seems to us a legal solecism." But this overlooks the fact that the ground of forfeiture is non-payment of the rent *when due*, and suggests the principle on which equity will relieve (and see *Cogley v. Brown*, 15 Phila. 162; *Times Co. v. Siebrecht*, *id.* 235), but not the rule at common law. Here, moreover, the lessor's demand was insufficient.

² *Wilder v. Ewbank*, 21 Wend. 587. Or that the forfeiture was incurred by cutting timber. *Camp v. Pulver*, 5 Barb. 91.

³ *Jackson v. Schutz*, 18 Johns. 174; *Jackson v. Brownson*, 7 *id.* 227; *People's Bank v. Mitchell*, 73 N. Y. 406; *Jones v. Roberts*, 3 Hen. & M. 436; *Keeler v. Davis*, 5 Duer, 507. So *Croft v. Lumley, Ellis, B. & E.* 1069; *Garnhart v. Finney*, 40 Mo. 449; *Roe v. Harrison*, 2 T. R. 425.

⁴ *Marsh v. Curteys, Cro. El.* 528; *Harvey v. Oswald*, *id.* 553, 572;

the condition be that the tenant shall not assign without the written permission of his landlord, and notwithstanding this he makes an assignment, if the landlord subsequently accepts rent from the assignee, it will be considered a waiver of the forfeiture, and will make the lease valid in the hands of the assignee.¹ So, also, a forfeiture for not repairing may be waived by a receipt of rent which became due after the right of re-entry accrued;² but not if the rent accrued before the expiration of a notice to repair; nor is it waived, although it may be suspended, by allowing a tenant further time to repair.³ Neither will the receipt of rent after a landlord has actually commenced his action of ejectment for the forfeiture,⁴ or as

Boggs *v.* Black, 1 Binn. 333; Garnhart *v.* Finney, *supra*; Clarke *v.* Cummings, 5 Barb. 339; Ireland *v.* Nichols, 46 N. Y. 413; Webster *v.* Nichols, 104 Ill. 160; Croft *v.* Lumley, *supra*, where such waiver was held a legal presumption, resulting from the acceptance of such rent, under protest.

¹ Whitchcot *v.* Fox, Cro. Jac. 398; Roe *v.* Harrison, *supra*.

² Fryett *v.* Jeffreys, 1 Esp. 393.

³ Doe *v.* Brindley, 4 B. & Ad. 84; Doe *v.* Birch, 1 M. & W. 408. Where a landlord finding the premises out of repair gave the tenant three months' notice to repair, pursuant to his covenant, held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed; and, secondly, that the notice was a waiver of any breach under the general covenant to repair. Doe *v.* Meux, 4 B. & C. 606. But as these covenants are independent, Baylis *v.* Le Gros, 4 C. B. n. s. 537, a general notice to repair, or to repair under the "covenants" of the lease, will not waive a right to proceed under either. Few *v.* Perkins, L. R. 2 Exch. 92; Roe *v.* Paine, 2 Camp. 520. In Alexander *v.* Hodges, 41 Mich. 691, it was said that continuing conditions are not waived, necessarily, by receipt of rent after their violation, since the lessor may exercise forbearance in furtherance of his own and the tenant's interests.

⁴ Jones *v.* Carter, 15 M. & W. 718; Dendy *v.* Nicholl, 4 C. B. n. s. 376; Imp. Ins. Co. *v.* Christie, 5 Rob. (N. Y.) 169. In the case of Bowman *v.* Foot, *supra*, it is doubted whether after an entry for the non-payment of rent, the acceptance of rent is a waiver of the forfeiture. So any election by the landlord to enforce a forfeiture will deprive him of his rights against tenant on the basis of a subsisting tenancy. Stuyvesant *v.* Davis, 9 Paige, 427; Linden *v.* Hepburn, 3 Sandf. 668; Grimwood *v.* Moss, L. R. 7 C. B. 360. The whole doctrine of waiving or not a forfeiture has sometimes been called a question of intent. Jones *v.* Roberts, 3 Hen. & M. 436; Manice *v.* Millen, *supra*. It is more probably a question of election. In Croft *v.* Lumley, *supra*, 705, Bramwell, B., says, "The com-

compensation for the occupation, expressly reserving the right to re-enter,¹ in either case amount to a waiver.

§ 498. Waiver by other Acts of the Landlord.—Other acts of the lessor, besides an acceptance of rent, have been held to waive a forfeiture, when they show an intention on his part that the lease should continue.² Thus, a notice to quit at the end of a half-year, given after the happening of a breach, has been held to produce such a result.³ And although a landlord will not generally lose his right to re-enter by merely lying by, for however long a period, and witnessing the act of forfeiture, yet if, with a full knowledge thereof, he permits the tenant to expend money in improvements, after a forfeiture has been incurred, it is a circumstance from which the jury may presume a waiver, as well as good ground for an application to a court of equity for relief.⁴ Whether a demand of rent, without expression ‘waiving a forfeiture,’ though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or word. If with notice he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid? or has he elected to avoid it? or has he made no election.” This is quoted with full approval in *Clough v. N. W. R. R.*, L. R. 7 Exch. 26, 34, and followed in *Camp v. Scott*, 47 Conn. 366. In this case, rent was payable quarterly, with right of re-entry if not paid within thirty days. Default was made in payment on two successive quarter-days, and demand was made before the expiration of thirty days from the second quarter. It was held that the lessor had waived his right to re-enter for non-payment of the rent due for the first quarter.

¹ *Croft v. Lumley, supra.*

² *Doe v. Meux*; *Doe v. Birch, supra*. So a negotiation for an extension of a lease, where that lease is spoken of as still subsisting, waives the forfeiture. *Ward v. Day*, 4 B. & S. 337. So where the lessor in a lease under seal agrees with the tenant, for a good consideration, to change the time for the payment of rent from the beginning to the end of the month. *Wilgus v. Whitehead*, 89 Pa. St. 131.

³ *Doe v. Miller*, 2 C. & P. 348.

⁴ *Doe v. Allen*, 3 *Taunt*. 78.

out its being paid by the tenant, is a waiver, may be questionable; but if such be the case, an agent making the demand must have authority to act as agent, or it must be proved that the landlord had notice of the forfeiture.¹ The landlord's mere knowledge of unauthorized acts, without his interference, will not preclude him on the ground of acquiescence. There must be some positive action on his part to constitute a waiver.² And where a lessee covenanted to erect certain houses within twelve months, and the steward of the lessor, after there was a clear ground of forfeiture, allowed the lessee to complete the buildings, the right of re-entry was held not to have been waived.³

§ 499. Acceptance of Rent accrued before Forfeiture. — But, to operate as a waiver, the landlord must accept rent which has accrued since the forfeiture happened;⁴ for if the condition be that the landlord may re-enter for non-payment of rent, or in case the rent be in arrear for a certain space of time, he may, at any time after the day of payment, receive that rent, or bring a suit at law for it, and yet insist upon the forfeiture.⁵ But if after a forfeiture has been incurred, he proceeds to make a distress for rent previously due, he thereby affirms the possession of the tenant, and waives his right to re-enter; because he cannot distrain for rent unless the relation of landlord and tenant continues to exist.⁶ And if

¹ *Doe v. Birch*, 1 M. & W. 402. A right of entry on the part of the landlord for a forfeiture may be suspended without being waived. *Manicie v. Millen*, *supra*.

² *Doe v. Allen*, *supra*; *Perry v. Davis*, 3 C. B. n. s. 769.

³ *Doe v. Brindley*, 12 Moore, 37.

⁴ *Stuyvesant v. Davis*, *supra*; *Jackson v. Allen*, 3 Cow. 220; *Bleecker v. Smith*, 13 Wend. 530.

⁵ *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Arnsby v. Woodward*, 6 B. & C. 519; *Co. Lit.* 211, b; *Jackson v. Sheldon*, *supra*.

⁶ *Zouch v. Willingale*, 1 H. Bl. 311; *Jackson v. Allen*, *supra*; *Price v. Worwood*, 4 H. & N. 512. Taking an insufficient distress after a forfeiture for rent accruing before, is no waiver of a right to re-enter. *Brewer v. Eaton*, 3 Doug. 230. And, per Ld. Ellenborough, in *Doe v. Johnson*, 1 Stark. 411, a distress and continuance in possession may be a waiver of an existing forfeiture, but not as to any right which accrues subsequently.

he brings an ejectment for the forfeiture, he can only recover rent due after the time of the demise laid in his declaration in the action for mesne profits ; for by bringing such an action he treats the lessee and his sub-tenants as trespassers from that time, and the claim to accruing rents is wholly inconsistent with his proceeding at law to enforce a forfeiture.¹

§ 500. Continuing Cause of Forfeiture not waived by Acceptance of Rent.—Examples.—Where, however, there is a continuing cause of forfeiture, the landlord will not be precluded from taking advantage of it, by receiving rent which accrued after the breach was originally committed. Thus, where the forfeiture was incurred by using two rooms in a house in a manner prohibited by the lease, such user was held to be a continuing breach, and the landlord was allowed to recover after receiving rent, provided the user continued after such receipt.² Besides this, the act by which the forfeiture was waived must amount to an affirmation of the tenancy, or a recognition of its continuance ; it is not enough that the landlord knows of the breach of the condition simply, without availing himself of his right to re-enter. And, therefore, in

¹ *Stuyvesant v. Davis, supra.*

² *McGlynn v. Moore*, 25 Cal. 384; *Doe v. Woodbridge*, 9 B. & C. 376. So where a building, conditioned in the lease to be used as a law and land office only, was used as an office for a justice of the peace to hold court in. *Farwell v. Easton*, 63 Mo. 446. And where a tenant, who is bound to keep the premises insured at all times during the demise, leaves them uninsured for a time, the receipt of rent is only a waiver of that portion of the breach which has occurred at the time the rent is received. See *Doe v. Woodbridge, supra*; *Doe v. Gladwin*, 6 Q. B. 953. In *Doe v. Jones*, 5 Exch. 498, the lessee was bound, under a penalty of forfeiture, to repair the demised premises, and to keep them repaired during the term ; he allowed the premises to be out of repair, and afterwards the landlord received rent. The tenant then proceeded to pull down a portion of the buildings and to make excavations, with the intention of repairing. It was held that for the continuous breach of the covenant the lease was forfeited, and that the reasonable time for repairing did not commence afresh after the receipt of the rent. So *Block v. Ebner*, 54 Ind. 544. An underletting is not a continuous forfeiture. *Ireland v. Nichols*, 46 N. Y. 413; and if the under-tenant is permitted to remain in to the end of his term, and after proceedings begun for forfeiture, this is no waiver by lessor. *Walbond v. Hawkins*, L. R. 10 C. B. 342.

a case where a tenant had forfeited his lease by carrying on a trade upon the premises, contrary to the agreement, and the landlord stood by for six years, and witnessed the act without moving in the matter, the court held that he had not waived the forfeiture by the long lapse of time that had occurred, because there was a continuing cause of forfeiture, and a fresh breach of the condition upon which the tenant held the lease, every day during the term that the forbidden trade was carried on upon the premises, and there had been no subsequent recognition of the tenancy.¹ Upon the same principle, the Supreme Court of New York held, where there was a covenant on the part of the lessee to plant a certain number of apple-trees upon a farm, and replace those that should decay or be destroyed, so as always to keep up a given number during the term, that it was a continuing covenant; and that, if the landlord should collect rent after he knew there was a breach of such a covenant, it would not waive the forfeiture, or prevent the landlord from re-entering, if, subsequent to the payment of such rent, there should still be a failure on the part of the tenant, to perform his engagement.²

§ 501. Waiver of continuous Condition. — We have seen that if a condition is single, it is wholly discharged by one waiver; but if continuous, the waiver only discharges the particular breach. A condition against assigning is of the former kind, and a waiver terminates it as effectually as a license.³ But a condition against underletting, though not

¹. *Doe v. Watt*, 1 Mann. & R. 694; *Doe v. Allen*, 3 Taunt. 78. Some positive act of waiver, as the receipt of rent, is necessary. *Id.* Merely standing by and seeing the lessee making alterations, which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry v. Davis*, 3 C. B. n. s. 769. Nor does a mere holding over by the lessee, no notice to quit being given. *Calderwood v. Brooks*, 28 Cal. 151. But where the lessee was restrained by a proviso from altering demised premises, and carrying on trade therein, and he changed them to an inn, and so used them with lessor's knowledge for more than twenty years, the court held the jury might presume a license. *Gibson v. Doeg*, 2 Hurlst. & N. 615.

² *Jackson v. Allen*, *supra*; *Bleecker v. Smith*, 13 Wend. 53.

³ *Lloyd v. Crispe*, 5 Taunt. 249; and see *ante*, § 287.

strictly continuous, is not a single condition, since it is susceptible of more than one breach during the term; a waiver of one breach will not therefore excuse a second; and for a similar reason a waiver of a breach of covenant to repair does not waive the right of re-entry for a subsequent want of repairs.¹ Neither is a tenant absolved from the performance of his covenants by a notice to quit; such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenants.²

SECTION IV.

BY MERGER.

§ 502. Defined. — Another means of dissolving the relation of landlord and tenant is by an operation of law, called a *merger*; which result follows whenever two or more distinct estates in the same lands are found to meet in the same person, without any intermediate estate. As, when a tenant for life, or for a term of years, purchases the fee, or the fee descends to him as heir-at-law; in either case the lease is extinguished or merged in the inheritance, since there would be a manifest inconsistency in allowing a person to have two distinct estates, immediately expectant on each other, while one of them includes the time of both, thus uniting the two different characters of landlord and tenant in the same person.³

¹ Doe *v.* Bliss, 4 Taunt. 735; per Patteson, J., Doe *v.* Pritchard, 5 B. & Ad. 781; and so McKildoe *v.* Darracott, 13 Gratt. 278, though on somewhat different ground.

² Gregory *v.* Wilson, 9 Hare, 683.

³ Roberts *v.* Jackson, 1 Wend. 478; Jackson *v.* Hull, 10 Johns. 481; 2 Black. Com. 177; Carroll *v.* Ballance, 26 Ill. 19. Unless there be two estates in the same person in the same land, there is no estate in that person to occasion a merger. An estate signifies such interest as the tenant hath therein; and a tenant is one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will. See the learned opinion of Mr. Justice Marvin, in Clift *v.* White, 12 N. Y. 526. See for instances of merger James *v.* Johnson, 6 Johns. Ch.

§ 503. **How produced.** — To produce a merger of the two estates, they must come to the same person in one and the same right; and the particular estate and that in reversion must be of the same quality, — that is, both legal, or both equitable.¹ No person can have a term of years in his own right, and a freehold in another right, without a merger of the term in the freehold. He may, however, have a freehold in his own right, and a term of years in right of another. As if he who has the reversion in fee, marries the tenant for years;² or the tenant makes the landlord his executor;³ the term of years is

417; *Van Nest v. Latson*, 19 Barb. 604; *Shaw v. Oakley*, 7 Phila. 110; *Hey v. McGrath*, 81* Pa. St. 310; *Bell v. Wright*, 31 Kan. 236. So where the tenant in fee of part of the land buys in the ground rent, it will merge *pro tanto*. *Paul v. Vannie*, 1 Clark, Pa. 332. But where the tenant in fee, subject to a ground rent, conveyed the fee and subsequently bought the rent, and again conveyed this, it was held that there was no merger of these two interests either in favor of the tenant or his grantee. *Atwater v. Lloyd*, 2 Clark, Pa. 17; *Charnley v. Hansbury*, 13 Pa. St. 16. It has been held, where the purchaser of property subject to the vendor's right to redeem conveys his interest to the lessee, that the term is merged in the fee. *Otis v. McMillan*, 70 Ala. 46, Stone, J., dissenting. But where a lessor contracted with his lessee in possession to sell him the leased property, said contract to be null and void unless the lessee should fulfil his part of it by a day named and falling within the term of the lease, and the lessee did not fulfil his part of the contract of sale, it was held that the lease was not merged in the contract of sale, and remained in force as if no such contract had been executed. *Bostwick v. Frankfield*, 74 N. Y. 207.

¹ *Phillips v. Randall*, 2 Binn. 138; *McMurphy v. Minot*, 4 N. H. 251. Where a lessee became owner of an undivided half of the estate of which the leased premises formed a part, it was held that this did not extinguish the lease, since there was no union of the greater and less estates in the same person and in the same right, which is necessary to create a merger. *Martin v. Tobin*, 123 Mass. 85.

² *Co. Lit.* 288, b; *James v. Morey*, 2 Cow. 246. A merger as to a portion of the premises, the legal titles to which have become united, may take place *pro tanto*, although no union takes place as to the residue. *Id.*; *Casey v. Buttolph*, 12 Barb. 637.

³ *Bac. Abr. Leases*. Where the greater and less estate meet and coincide in the same person, it is admitted that, at law, the lesser estate is annihilated. But this rule is not inflexible in equity, for there it depends on the intention of the parties, and a variety of other circumstances, whether a merger shall take place or not. Per Willard, J., in *Reed v. Latson*, 15 Barb. 9.

in neither case merged, because, by either operation, he would have the inheritance in his own right, while he would take the term of years in right of his wife, or in his character of executor. But if the case is reversed, and the tenant marries the lessor, or purchases the inheritance when he holds the term as executor, in either event the term of years will be swallowed up in the inheritance, or, in the language of the law, be merged.¹

§ 504. What Estates will merge.—When Merger not permitted.

— The more remote estate must be the next vested estate in remainder or reversion, without any intervening estate either vested or contingent. A mere right or title will not suffice; and an *interesse termini*, not being a vested interest, but resting merely in contract, is no such intervening interest as will prevent the application of the law of merger. Therefore where A. made a lease to B. for ten years, to begin presently, and afterwards granted a second lease to C. of the same land, to commence at a future day, and in the meantime B. purchased the fee, by which his tenancy was merged,—it was held that the second lessee might at once enter and enjoy his term. The first term here merged, notwithstanding the *interesse termini*; and this latter interest only conferred a right of possession upon the second lessee earlier than it could otherwise have done without the merger.² It must be observed, however, that the strict legal doctrines of merger are not favored in equity, where it is not allowed to take place but for good reason. Nor will it be permitted where the intention of the parties was manifestly otherwise, or the requirements of justice demand that it should not take place.³

¹ Lee's Case, 3 Leon. 110; Co. Lit. 388, b. The writer acknowledges his obligation to Mr. Preston's practical treatise on Conveyancing, for a large portion of this brief outline of some of the distinctive features of the law of merger.

² Dyer, 112; Symonds *v.* Cudmore, 4 Mod. 1; Whitchurch *v.* Whitchurch, 2 P. Wms. 236.

³ Clift *v.* White, 12 N. Y. 519; James *v.* Morey, *supra*; Bascom *v.* Smith, 34 N. Y. 320; Nicholson *v.* Halsey, 1 Johns. Ch. 417; Vanderkemp *v.* Skelton, 11 Paige, 28; Sheldon *v.* Edwards, 35 N. Y. 279; Purdy *v.* Huntington, 42 *id.* 334; Townsend *v.* Read, 15 Abb. N. C. 285. And

And if there be any beneficial interest to protect, such as those of creditors, legatees, husbands, or wives, or any right or intention to the contrary, the union of the legal and equitable interests in one person will not effect a merger.¹ The same rule applies where the person in whom the two estates unite is under some disability to make an election, such as is caused by infancy or insanity; or where the lease has been assigned to the lessor as security for a debt.²

§ 505. Estates merging must be held in same Right.—Exceptions. — Mr. Preston, in his treatise on the law of merger, notes a distinction as to the rule that there will be no merger if the two estates are held in different rights, or the freehold is held by the owner of the fee in his own right, and the term in *autre droit*; which is, that the accession of one estate to another, merely by the *act of law*, as by marriage, descent, executorship, or intestacy, will not occasion a merger when the two estates are held in different rights; while a descent of the inheritance will merge a term which a person has in his own right, though he be trustee of that term.³ And although there will be no merger where either of the two estates which are held in different rights is an accession to the other by act of law, yet the lesser estate will merge as often as one of them is an accession to the other by *the act of the party*, as

where the lessor, being also mortgagee of the term, was put into possession for a breach of condition under the lease, and subsequently foreclosed and sold the mortgage, it was held that the purchaser at the foreclosure sale was liable for subsequently accruing rents. *People v. Dudley*, 58 N. Y. 323.

¹ *In re DeKay*, 4 Paige, 403; *Cooper v. Whitney*, 3 Hill, 96; *Johnson v. Webster*, 4 De Gex M. & G. 474. A lease is not merged by a conveyance from the lessor to the lessee, as against an attachment made in the meantime against the lessor. *Buffum v. Deane*, 4 Gray, 385.

² *Gardner v. Astor*, 3 Johns. Ch. 53; *Starr v. Ellis*, 6 *id.* 393; *Gibson v. Crehore*, 3 Pick. 475; *Mech. Bank v. Edwards*, 1 Barb. 271; *Breese v. Bange*, 2 E. D. Smith, 474. A surrender of a leasehold estate to the reversioner creates a merger, but will never be allowed to defeat the rights of a third party, which have intervened before the merger took effect. *Gaskill v. Turner*, 3 Cal. 334.

³ *3 Prest. Conv.* 309; *Lee's Case*, 3 Leon. 110; *Plowd.* 418.

by purchase, or the like.¹ This exception is allowed on the principle that, as a merger is the sinking of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, legatees, infants, husbands, or wives.²

§ 506. Remote Estate must be as large as, or larger than the Preceding Estate. — The estate in reversion or remainder must also be as large as, or larger than the preceding estate. An estate for years may merge in an estate for life, or any other freehold, even if the term be for a thousand years, and although, according to all reasonable calculation from the utmost length of human life, it would certainly continue beyond the duration of any person's life; for, in legal contemplation, an estate of freehold is of greater extent, and of higher estimation, than any chattel interest. This rather curious doctrine of the law may, perhaps, be deduced from the dependent state of those who were formerly the tenants of these chattel interests; and, from the power which, prior to the statute of 21 Hen. VIII. c. 15, the freeholder possessed, of defeating such interests, by suffering his own title to be impeached in a feigned action. An estate for years may also merge in an estate in fee; and an estate *pour autre vie* in an estate for one's own life. So an estate for years may merge in another estate or term of years, in remainder or reversion, when the term to be merged is of shorter duration than the other.³

SECTION V.

BY SURRENDER.

§ 507. Defined. — By Express Words, or Operation of Law. — A surrender is the yielding-up of an estate for life or years to him that has the immediate reversion or remainder, wherein the particular estate becomes extinct by a mutual agreement

¹ 3 Prest. Conv. 310.

² Id. 294, 373; Donnisthorpe *v.* Porter, 2 Eden, 162.

³ 3 Prest. Conv. 176; 4 Kent, Com. 98.

between the parties.¹ It is either in express words, by which the lessee manifests his intention of yielding up his interest in the premises to the lessor, or by operation of law, when the parties, without any express surrender, do some act which implies that they have both agreed to consider the surrender as made. It differs from a *release*, in that the latter operates by the greater estate descending upon the less; while a surrender is the falling of a less estate into a greater. The term surrender by operation of law is properly applied to cases where the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Thus, where a lessee for years accepts a new lease from the reversioner, he is estopped from saying that his lessor had no power to make such a lease; and as the lessor cannot grant a new lease until the prior one has been surrendered, the acceptance of the new lease necessarily implies a surrender of the former one.² Such a surrender is an act of law, and takes place independently of the intention of the parties.³ All such acts, however,

¹ Co. Lit. 337, b; Schieffelin *v.* Carpenter, 15 Wend. 400.

² Enyeart *v.* Davis, 17 Neb. 228.

³ Challoner *v.* Davies, 1 Ld. Ray. 402; Livingston *v.* Potts, 16 Johns. 28; Wheeler *v.* Walden, 17 Neb. 122. After a lessee had underlet the premises to two separate tenants, the landlord called on the under-tenants and demanded the rent reserved, forbade them to pay any more rent to the original lessee, and said he had taken the place off the lessee's hands; it was held that these facts were conclusive that there was a surrender, in law, of the term granted by the original lease. Bailey *v.* Delaplaine, 1 Sandf. 5. And where both the sub-lessee and the lessee were paying rent to the lessor, and the lessee said he should leave if further rent were accepted from the sub-lessee, and upon the lessor saying he might, did leave and gave up the key, which the lessor did not return, it was held that this made a surrender by operation of law. Amory *v.* Kanoffsky, 117 Mass. 357. A lease dated Dec. 1, 1855, for three years and nine months, with power to remove buildings erected by the tenant, was held to be surrendered, and its provisions abrogated, by a second lease, dated Dec. 6, 1856, containing different terms, and among them a clause for the surrender of the premises at the expiration of the term, reasonable use and wear thereof and damages by the elements excepted; and that under the second lease the tenant could not remove the buildings. Jungerman *v.* Bovee, 19 Cal. 354. An agreement for a new lease will not effect the

as bind parties to a surrender, operate by way of estoppel, and must be acts of notoriety, not less formal and solemn than the execution of a deed; as, for instance, livery, entry, acceptance of an estate, or the like.¹

§ 508. To whom to be Made.—The person to whom the surrender is made must, as we have said, have an estate immediately in reversion or remainder; but it is immaterial whether he has it in fee, in tail, or for life.² For this reason, an under-lessee cannot surrender to the original lessor;³ but surrender of an existing lease by operation of law unless a new lease is made valid in law to pass an interest according to the contract and intention of the parties. Thus, in New York a verbal agreement for a term longer than one year will not operate as a surrender of an existing lease under seal. *Coe v. Hobby*, 72 N. Y. 14.

¹ *Lyon v. Reed*, 13 M. & W. 285; *Nelson v. Thompson*, 23 Minn. 508. Where one not a party to a lease is shown to be in possession of demised premises in subordination to such lease, the law presumes that he is an assignee of the lessee; but this presumption is rebutted by proof that, during the possession of the third party, the lessor received from the lessee a surrender of the term. Such surrender, if produced by the lessor, is an admission that the lessee, and not the occupant, was at its date tenant to the lessor. *Durando et al. v. Wyman*, 2 Sandf. 597. Where a landlord grants a new lease to a stranger, with the assent of the tenant under an existing lease, and the latter gives up his possession, there is a surrender by operation of law. *Davison v. Gent*, 1 H. & N. 744. A lease for a term of years may be terminated by the landlord's resuming the control of the premises, by the consent and with the approval of the tenant. *Williams v. Jones*, 1 Bush, 621. See *Coe v. Cassidy*, 72 N. Y. 133. But not where such control is for the purpose of taking proper care of the premises for the interest of both parties, without absolving the tenant from the obligations of his covenant. *Orne in re*, 15 Phila. 489; and see *Brenckmann v. Twibill*, 89 Pa. St. 58.

² Where, therefore, there was a lease by husband and wife, but the rent was reserved to the wife, a surrender could only be made to her. *Woodward v. Lindley*, 43 Ind. 333. But an agent who has let, though in the name of his principal, may accept a surrender. *Amory v. Kanoftsky, supra*.

³ 2 Prest. Abst. 7. The doctrine of surrender cannot apply on a lease in fee, for there is no reversion. *Springstein v. Schermerhorn*, 12 Johns. 357. A surrender which cannot operate as such by reason of an intervening term will take effect as a grant of the term. *Doe v. Brown*, 2 Ellis & B. 331. Although a surrender of a life-estate to the owner of the fee is, as between the parties, an extinguishment of the estate surren-

a lessee for years may surrender to him who has the reversion only for years, though the lease be for several years, and the reversioner has it only for one year, or a less term.¹ And if a lessee demises part of his estate to the lessor, he may surrender the other part; for the reversion of that part remains in the lessor.² A surrender to an infant is also good, for his assent will be presumed till a disagreement appears.³ There can be no surrender, however, except by a party in possession; and it can only be made to the person having a higher estate, in which the estate to be surrendered may merge. Therefore, a tenant for life cannot surrender to him in remainder for years; nor to a tenant for years who is ousted of his term before entry, for he has but a bare right. Neither can one joint tenant surrender to another.⁴

§ 509. To be by Written Instrument. — At common law, an express surrender of things lying in grant could only be dered, yet it may have continuance, to uphold a prior interest derived under it. *Doe v. Pyke*, 5 M. & S. 146. But where an alleged outstanding term appears to have done the duty for which it was created, the jury is at liberty to presume a surrender of it. *Bartlett v. Downes*, 3 B. & C. 616; *Doe v. Sybourn*, 7 T. R. 2; s. c. 2 Esp. 496.

¹ *Hughes v. Robotham*, Cro. El. 302. A satisfied term may be presumed to be surrendered; but an unsatisfied term raised for the purpose of securing an annuity during the life of the annuitant, cannot; and may be set up as a bar to the heir-at-law, even though he claims only subject to the charge. *Doe v. Staple*, 2 T. R. 684.

² 2 Roll. Abr. 494. An assignment of a lease by the lessee to the lessor, as collateral security for a debt, does not operate as a surreuder or merger of the lease, but as a mortgage only. *Breese v. Bange*, 2 E. D. Smith, 474. And where a tenant abandoned the premises, the re-letting of them by the landlord at the request of a surety for the rent, and for his account, does not amount to such a surrender of the premises as to discharge the surety. *McKensie v. Farrell*, 4 Bosw. 192. See *Holme v. Brunskill*, 3 Q. B. D. 495. If one holding an invalid deed from the lessor accepts a conveyance of the term from the lessee, this is not a surrender, but an assignment, and the assignee is liable for the rent. *McLeran v. Benton*, 43 Cal. 467.

³ *Thompson v. Leach*, 2 Vent. 198, 208.

⁴ 2 Roll. Abr. 494; *Shep. Touch.* 303; 2 Marsh, 33. A surrender of a lease cannot be made to sequestrators from the Court of Chancery; it must be to the lessor, or to a party legally entitled under him. *Cornish v. Searell*, 8 B. & C. 471.

made by deed, although a surrender of things in possession might be made by parol, without livery of seisin, or other formal mode of conveyance, as it was but a restoration of the particular estate to him in reversion or remainder.¹ But the Statute of Frauds prohibits a term of years, or other interest in land, to be surrendered, unless by deed, or note in writing, or by operation of law.² A deed is not, therefore, necessary to effect a surrender, since it may be by a note in writing; but no verbal arrangement or agreement between the parties can *per se* effect such a purpose, or cancel a lease for years.³ Therefore a mere parol agreement between a landlord and tenant, to determine a tenancy in the middle of a quarter, is not binding upon either.⁴ And although a tenant may agree in writing to surrender his lease for a particular purpose, which purpose is not effected, such conditional agreement will not operate as a surrender.⁵ But an unconditional agreement between a landlord and a third person with the assent of the tenant, during the term, to rent the premises to such third person, followed by a change of possession and the payment of rent by the new tenant, will amount to a valid surrender of the old lease, and an acceptance thereof on the part of the landlord.⁶

¹ Co. Lit. 338, a; *Wilston v. Pilkney*, 1 Ventr. 242.

² See *Coe v. Hobby*, 72 N. Y. 14.

³ *Rowan v. Lytle*, 11 Wend. 616; *Farmer v. Rogers*, 2 Wils. 26; *Matthews v. Sawell*, 8 Taunt. 270; *Peters v. Barnes*, 16 Ind. 219; *Lamar v. McNamee*, 10 Gill & J. 126; *Kittle v. St. John*, 7 Neb. 73.

⁴ *Thomson v. Wilson*, 2 Stark. 379; *Bailey v. Wells*, 8 Wisc. 141. Although such license, accompanied by some act of the landlord indicating his acceptance of possession, may, together, operate as a surrender, by operation of law. *Grimman v. Legge*, 8 B. & C. 324; *Auer v. Penn*, 92 Pa. St. 444. And if the tenancy is at will, and the tenant quits with the landlord's consent, this is a waiver of notice and a surrender. *Farson v. Goodale*, 8 Allen, 202.

⁵ *Coupland v. Maynard*, 12 East, 134; *Hamerton v. Stead*, 3 B. & C. 478. Evidence of a parol agreement, contemporaneous with a lease for years, that a tenant might surrender at any time, is inadmissible. *Brady v. Prior*, 1 Hilt. 61.

⁶ *Whitney v. Meyers*, 1 Duer, 266. And where the lessee did not go upon the land, and paid no rent for ten years, the landlord was held justified in treating this as an abandonment. *Porter v. Noyes*, 47 Mich. 55. So where the tenant leaving the country told the landlord to take charge

§ 510. **Words to Create. — By Construction.** — The technical and proper words of a surrender are, “surrender and yield up;” but any form of words by which the intention of the parties is sufficiently manifested will operate as a surrender.¹ Thus, if a lessee for years remise, release, discharge, and forever quitclaim to the lessor, all his right, title, and interest in or to such lands, it will be considered a surrender. Or if a lessee for life leases to the lessor for the life of the lessee, it will be equivalent to a surrender.² But a written notice given by the tenant, of his intention to quit the premises at a time when he believed his tenancy would expire, but which is afterwards discovered not to be the true time, will not operate as such.³ And where one tenant in common of a reversion agreed in writing with another, who was possessed of a term in the whole of the land, to give him a certain sum on a given day, when either a sale or a partition of the estate was to be made, as a compensation for quitting possession, and the other agreed to give up possession on a day subsequent to that fixed for payment, it was held that the instrument did not operate as a surrender when signed.⁴

of the growing crop, finish its cultivation, pay himself for rent and advances, and apply the balance to pay other debts of the tenant. *Shahan v. Herzberg*, 73 Ala. 59. But abandonment is not to be inferred from mere non-user. *Doty v. Gillette*, 43 Mich. 203; nor from the tenants' moving from the premises, leaving growing crops, and a person in charge. *Chancy v. Smith*, 25 W. Va. 404. The statute of New York of April 13, 1860, which authorizes a tenant to quit and surrender the lease of a building which, without any fault or neglect on his part, shall be so injured by the elements, or other cause, as to become untenantable and unfit for occupation, seems to require no other formality to operate a surrender than that the tenant shall quit possession and notify the landlord that he has done so.

¹ *Smith v. Mapleback*, 1 T. R. 441. Where the parties to a lease agreed under seal to submit their differences to arbitration, the agreement providing that the lease should be surrendered, the arbitrators to determine how much damage or compensation, if any, should be paid to the lessee by the lessor for such surrender, it was held that this amounted to an absolute surrender, although no valid award was made, or the submission to the arbitrators was revoked. *Harris v. Hiscock*, 91 N. Y. 340.

² *Challoner v. Davies*, 1 Ld. Ray. 402; 2 Roll. Abr. 497.

³ *Doe v. Milward*, 3 M. & W. 328. But see *Aldenburgh v. People*, 6 C. & P. 212.

⁴ *Weddall v. Capes*, 1 M. & W. 50.

Nor will an agreement between the lessor and a stranger that the lessee shall have a new lease, or an acceptance by a lessee of a new lease in trust for another, in either case amount to a surrender.¹

§ 511. Destruction or Cancellation of Deed not a Surrender.—The erasure or cancellation of a deed will not divest the estate; nor will the tearing off the names of the parties, or of the seals,² or the entire destruction of the instrument by mutual consent, operate as a surrender; because a deed is not of the essence of a contract, but only evidence of it; and, therefore, the destruction of the lease or contract would not follow upon the destruction of the deed.³ This is a necessary consequence of the Statute of Frauds, which declares that no leases, estates, or interests, either of freehold or term of years, shall be assigned, granted, or *surrendered*, unless by deed, or note in writing, signed by the party or his agent, or by act or operation of law. The statute, from the time of 29 Charles II., intended to take away the former mode of transferring interests in land, by signs, symbols, and words only; and, therefore, as livery of seisin on a parol feoffment was a sign of passing the freehold before the statute, but is now taken away, so the cancelling of a lease was a sign of a surrender before the statute, and is now abolished, unless there be a writing under the hand of the party.⁴ The fact of cancellation, however, may be strong corroborating evidence in aid of other proof, such as the granting of a new lease to other parties, that a surrender in law has taken place.⁵

§ 512. By Operation of Law.—Acceptance of New Lease.—A surrender by act and operation of law is a case excepted

¹ *Porry v. Allen*, Cro. El. 173; Com. Dig. Surrender, H. L. 1.

² *Doe v. Thomas*, 9 B. & C. 288. The fact of a lease being found in the possession of the lessor in a cancelled state is no evidence of a surrender by deed, or note in writing. *Id.*

³ *Raynor v. Wilson*, 6 Hill, 469; *Rowan v. Lytle*, *supra*; *Whitton v. Smith, Freeman*, 85; *Nicholson v. Halsey*, 1 Johns. Ch. 417.

⁴ *Roe v. Archbp. of York*, 6 East, 86.

⁵ *Walker v. Richardson*, 2 M. & W. 882; *Wootley v. Gregory*, 2 Y. & J. 536; *Holbrook v. Tirrell*, 9 Pick. 105.

out of the statute; for the acceptance by the tenant of a new lease of the same premises, during the period of the first lease, will be deemed to be a virtual surrender of the former lease. It admits the capacity of the lessor to make such a lease, which he would not have had without a surrender of the first lease, and the presumption of law is that the lease had been surrendered; for no man would take from another a lease of a farm or house of which he has already the legal control, and agree to pay him rent for it.¹ This presumption is raised by the circumstances of the case, and by the acts of the parties, showing that the acceptance of the second lease, even for a shorter term than the first, implied a surrender of the first. But, as the presumption of a surrender arises from the acts of the parties, which are supposed to indicate an intention to that effect, it must follow that where no such intention can be presumed without doing violence to common-sense, the presumption cannot be supported. The cases have settled that simply receiving a second lease raises the presumption; but if the acts of the parties, taken all together, are such as to rebut the idea of a surrender, then none ought to be presumed.² An acceptance of a surrender will not be presumed from mere lapse of time; nor from the circumstance that rent has been paid by a third person, and not by the original tenant.³ And the second

¹ *Coleman v. Maberly*, 3 T. B. Monr. 220; *Jackson v. Gardner*, 8 Johns. 394; *Roe v. Archbp. of York*, *supra*. See *Donkersley v. Levy*, 38 Mich. 54.

² *Van Rensselaer v. Penniman*, 6 Wend. 569; *Hutchins v. Martin*, Cro. El. 605; *Springstein v. Schermerhorn*, 12 Johns. 357; *Livingston v. Potts*, 16 *id.* 28. Thus, acceptance of a second lease is no surrender by a party in possession, under a clause in the first by which he was to occupy until repaid the cost of his improvements. *Flagg v. Dow*, 99 Mass. 18. A lessee who had paid his rent occasionally to a trustee, and occasionally to the *cestui que trust*, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having the legal title: held, that, as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term. *Ackland v. Lutley*, 9 A. & E. 809. And the fact of the expiration of a lease, and of the landlord's letting immediately to the tenant, is held not to amount to a surrender and acceptance. *Peters v. Fisher*, 50 Mich. 331.

³ *Doe v. Cooke*, 6 Bing. 174; *Copeland v. Watts*, 1 Stark. 96. It is

lease, which is to work a surrender of the first, must be good and valid in law to vest in the lessee the term it professes to convey, and bind him to a performance of its conditions on his part; for, if such lease be void, its acceptance by the lessee is no surrender.¹ If, therefore, a lease be made to a minor, it is no surrender of a former lease, unless he assents to it when at full age.² Nor will it amount to a surrender, if the new lease be made to one who is *non compos mentis*, for he cannot assume an obligation to pay rent.³ And the acceptance of a new lease by the same tenant at an increased rent will not be deemed a surrender where the lessee at the same time protests against the right of the lessor to exact an increased rent, claiming a renewal of the lease, at the original rent.⁴

§ 513. Operation of New Lease to Create. — A lease to commence *in futuro* may operate as an immediate surrender of necessary in every case, in order that the new agreement may be effectual to work a surrender by operation of law, that it be valid and sufficient to vest in the new tenant or lessee the estate or term contemplated by the parties, and bind him to pay the stipulated rent. *Whitney v. Meyers*, 1 Duer, 266.

¹ *Davison v. Stanley*, 4 Burr. 2210; *Schieffelin v. Carpenter*, 15 Wend. 400; *Smith v. Niver*, 2 Barb. 180. A lessor who has consented to a change of tenancy, and permitted a change of occupation, and received rent from the new tenant, cannot afterwards charge the original tenant with rent accruing during the occupation of the new tenant. *Per Harris, J.*

² *Id. ; Lloyd v. Gregory*, Sir Wm. Jones, 405.

³ *Thompson v. Leach*, 2 Vent. 198.

⁴ *Tracy v. Alb. Exch. Co.*, 7 N. Y. 472. This doctrine of a surrender by operation of law has been extended to cases in which the tenant has not himself taken a new lease, but has put a third person in possession of the premises, who has with his own concurrence and the concurrence of the landlord, been treated as the landlord's immediate tenant. *Thomas v. Cook*, 2 B. & A. 119; *Johnstone v. Huddlestone*, 4 B. & C. 922. And has been acted upon in several American cases. *Smith v. Niver, supra*; *Bailey v. Delaplaine*, 1 Sandf. 5; *Logan v. Anderson*, 2 Doug. Mich. 101. Thus, a delivery of the keys, and negotiation by lessor with a third party, are competent evidence on the question of surrender. *Hill v. Robinson*, 22 Mich. 244. In *Whitney v. Meyers, supra*, it was held that an absolute parol lease, made by the landlord to a new tenant, during the term of a written lease, with the consent of the first lessee, amounts to a surrender of the first lease; and see *post*.

the first lease, but there cannot be a surrender to operate *in futuro*.¹ And though a new lease is granted conditionally, it may yet operate as a surrender in law; as, where a man made a lease for forty years, and the lessee afterwards took a lease of the same premises for twenty years, upon condition that, if he did a particular act, the second lease should be void, and the lessee afterwards broke the condition, so that the second lease became void, the first lease was, nevertheless, deemed to have been surrendered.² But a parol agreement between a landlord and his tenant, of a term of six years, that the tenant shall surrender his interest in the demised premises, and that the landlord shall execute a new lease to a third person, does not operate as a surrender, unless the new lease be executed, and pass an interest according to the contract and intention of the parties, although the tenant may quit the premises, and the third person enter and remain in possession for the space of a year, and pay rent to the landlord; for the original lease remains in force, and the landlord may maintain an action of covenant against the original tenant for rent subsequently accrued.³ Nor will a recital in a second lease, that it was granted in part consideration of a surrender of a prior lease of the same premises, amount to a surrender by deed, or note

¹ Doe *v.* Milward, 3 M. & W. 328; Hutchins *v.* Martin, Cro. El. 605. A tenant of a lease under seal, agreed, without seal, that if he failed to perform certain things, he would relinquish his lease: held, that, though for want of a seal this could not operate as a defeasance, it was operative as a contingent surrender, taking effect absolutely on failure. Allen *v.* Jaquish, 21 Wend. 628.

² Co. Lit. 218, b.; Thursby *v.* Plant, 1 Saund. 236, b.

³ Schieffelin *v.* Carpenter, 15 Wend. 400. A written lease may be surrendered by the tenant's abandonment and the landlord's assent thereto, and re-letting, but not by the abandonment only. Stobie *v.* Dills, 62 Ill. 432. Even if the landlord advertises for a new tenant. Snyder *v.* Middleton, 4 Phila. 343. See Meyer *v.* Smith, 33 Ark. 627; Buckner *v.* Warren, 41 *id.* 532, where it is held that if the tenant expressly repudiate the lease the landlord may treat it as rescinded and take possession by unlawful detainer. If he take possession he cannot treat the contract as in force and sue for the whole rent. Rice *v.* Dudley, 65 Ala. 67. An agreement to accept a surrender of even a parol lease is required by the Delaware Statute of Frauds to be in writing. Logan *v.* Barr, 4 Harr. 546.

in writing, of such prior lease; because it does not purport by its terms to be a surrender or yielding up of the interest.¹

§ 514. By Parol Acts.—A tenancy from year to year, or for years, cannot be surrendered by a mere agreement of the landlord to accept a third person in the place of his tenant, unless the agreement be in writing, or such third person actually takes possession of the premises. But a parol agreement that another tenant should be substituted in place of the tenant, with an actual change of possession, is held to be a sufficient surrender, under the Statute of Frauds, to determine the former tenancy.² And if a landlord attests a notice given by a lessee to his under-tenant, to pay rent to the landlord, and have knowledge of its contents, it will terminate the tenancy of the lessee, and discharge him up to that time.³ So where a sole tenant from year to year, before the termination

¹ *Roe v. Archbishop of York*, 6 East, 86.

² *Stone v. Whiting*, 2 Stark. 235; *Whitney v. Meyers*, *supra*. Such an agreement, therefore, though insufficient as a surrender by writing, is admissible in proof of a surrender by operation of law. *McGlynn v. Brock*, 111 Mass. 219. See *Davis v. Murphy*, 126 *id.* 143, as cited *ante*, § 482.

³ *Harding v. Crethorn*, 1 Esp. 57. Under a lease with the usual provision that, if the premises became vacant, the landlord might relet, and charge the tenant with any deficiency of rent, the tenant gave notice of his inability to continue to pay rent, and the landlord thereupon consented to a reletting; there was held to be no surrender, but that the original lessee was still liable for a deficiency. *Ogden v. Rowe*, 3 E. D. Smith, 312. So where the tenant abandoned, and the key was handed to the landlord, who put up a notice to relet, and had repairs done, it was held to be no surrender. *Pier v. Carr*, 69 Pa. St. 326; *Milling v. Becker*, 96 *id.* 182; *Oastler v. Henderson*, 2 L. R. Q. B. Div. 375; and see *Lucy v. Wilkins*, 33 Minn. 441; *Pond v. Holbrook*, *id.* 291. In *Fifty Associates v. Grace*, 125 Mass. 161, a lease to A. contained covenants to pay rent for the premises to be used for a certain purpose and that no assignment should be valid without the consent in writing of the lessor. A., with such assent, assigned the lease to B.; and B., with such assent, but without the knowledge of A., assigned the lease to C., to use the premises for a different purpose. It was held that A. was released from liability to pay rent during C's occupation, since the effect of the assent of the original lessor to the assignment to C. was to create a new tenancy inconsistent with the terms of the lease to A., and A's liability for rent, while such tenancy continued, ceased.

of his tenancy, entered into an agreement with his landlord for a lease, to be granted to him and another jointly, and both entered upon and occupied the premises jointly,—it was held that the first tenancy was determined, though the lease was never executed pursuant to the agreement.¹ And where a tenant underlet the premises, and the landlord accepted the under-tenant as his tenant, and collected rent from him, which arrangement was assented to by the original tenant, it was held to amount to a virtual surrender of the tenant's interest by operation of law.²

§ 515. By Change of Possession.—Implied from Acts of Parties.—An actual and continued change of possession by the mutual consent of parties will, as we have said, amount to a surrender by operation of law; and that whether the possession is delivered to the landlord himself, or to another in his behalf. It may also be implied from circumstances and the acts of the parties.³ Thus, where the owner of a ferry leased it to a person verbally for a certain rent, but the man, at the end of a few weeks, finding it unprofitable, proposed to become the servant of the owner as boatman, which was assented to, and he received wages for his services; the court decided that this was a surrender to the owner of his interest in the ferry.⁴ And although a tenancy from year to year is not determined by the mere removal of a tenant, with a delivery

¹ *Hamerton v. Stead*, 3 B. & C. 478.

² *Thomas v. Cook*, 2 B. & A. 119. *Amory v. Kanoffsky*, 117 Mass. 357. In *Murray v. Shave*, 2 Duer, 183, the tenant requested to be allowed to give up her lease, and the landlord thereupon entered into a new agreement with another person. This was held a virtual acceptance by the landlord of the tenant's offered surrender, and discharged her from her liability on the lease. So see *Commonwealth v. Conway*, 1 Brewst. 509.

³ *Hall v. Burgess*, 5 B. & C. 332; *Reeve v. Bird*, 1 Cr. M. & R. 37; *Grimman v. Legge*, 2 Mann. & R. 438, note. *Wood v. Partridge*, 11 Mass. 493. “The rule of law as now settled by the recently adjudicated cases is that any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession of the demised premises, amount to a surrender by operation of law.” Per *Bigelow*, C. J., *Talbot v. Whipple*, 14 Allen, 177.

⁴ *Peter v. Kendal*, 6 B. & C. 703.

of the key before the expiration of the term, or even by a parol license from the landlord, to quit in the middle of a quarter,¹ yet if, in either case, both parties act upon the license, and the landlord takes possession, or acts in such a manner as to render it impracticable for the tenant subsequently to use or occupy the premises, the tenancy is legally determined.² As in Massachusetts, where the lease of a dwelling-house, under seal, was held to be determined by a delivery of the key to the lessor, accompanied by his receipt of it and putting another tenant in the house.³ But where a surrender is effected by a change of possession, the consent of all parties to the change of tenancy seems to be necessary. For where a tenant from year to year agreed by parol with the landlord's agent to quit at the ensuing quarter-day, and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession, as the old tenant refused to quit,— it was held that this did not amount to a surrender by operation of law.⁴ But the

¹ *Prentiss v. Warne*, 10 Mo. 601; *Mollett v. Brayne*, 2 Camp. 103; *Thomson v. Wilson*, 2 Stark. 379; *Doe v. Johnston*, 1 McClel. & Y. 146; *Martin v. Stearns*, 52 Iowa, 345; *Ladd v. Smith*, 6 Oregon, 316. The burden is on the tenant to show the acceptance of a surrender; and where the landlord received the keys but notified the tenant that he should hold him for rent, and thereafter put a bill on the premises and rented them to another, this was held no surrender and the former tenant was held bound for the term's rent, less the amount received from the latter tenant. *Auer v. Penn*, 99 Pa. St. 370.

² *Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & C. 324; *Walls v. Atcheson*, 3 Bing. 462; *Smith v. Niver*, 2 Barb. 180; *Smith v. Wheeler*, 8 Daly, 135; *Lamar v. McNamee*, 10 G. & J. 116.

³ *Randall v. Rich*, 11 Mass. 494; *Hanham v. Sherman*, 114 Mass. 19; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *Dos Santos v. Hollinshead*, 4 Phila. 57; *Matthews v. Tobenor*, 39 Mo. 115; *Bacon v. Brown*, 9 Conn. 339; *Dodd v. Acklom*, 6 M. & G. 672. It was held that, where there are two landlords, an acceptance of the key by one binds the other, where the latter leaves the management of the business to the former.

⁴ *Alchorne v. Gomme*, 2 Bing. 54; *Carpenter v. Thompson*, 3 N. H. 204. Mere proof that the key had been delivered to a servant at the landlord's house, and a subsequent declaration that the key had been lost or mislaid, is no evidence of an acceptance of a surrender. *Harland v. Brownley*, 1 Stark. 455. Nor where the landlord receives the key, but refuses to take the premises. *Townsend v. Albers*, 3 E. D. Smith, 560;

mere receipt of rent from an under-tenant of part of the premises, is no evidence of the lessor's consent to the lessee's abandonment of the entire premises.¹

§ 516. **Underletting.—Substitution.—Effect of Each.**—If a landlord underlets the premises without notice to the tenant that it is on his account, it dispenses with a surrender on the part of the tenant.² And where tenants holding from year to year, under the same landlords, agree to exchange, with the consent of the agent of both landlords, and take possession, it will operate as a surrender of the old tenancies, and the creation of new demises.³ But no mere agreement between a landlord and tenant for the substitution of another tenant, or any other act of a landlord which can be referred to a different motive, will amount to a surrender.⁴ Where, however, A. leased to B. for eight years, B. assigned to C., and C., on application by A. to have the premises, made with A. the following agreement: “A. to have the premises on the terms mentioned in the original lease, and to pay £8 10s. over and above the rent annually, towards the good-will,”—it was held that this agreement was not an under-lease from year to year, but a surrender of the original term; since the lessor was to have the premises *on the terms of the original lease*, and one of those terms was, a right to hold the premises for the unexpired term.⁵ Where a tenant from year to year underlet the premises, and the original landlord accepted the or where the tenant throws the key down and the lessor picks it up; *Withers v. Larrabee*, 48 Me. 570. So see *Pier v. Carr*, *Oastler v. Henderson*, *ante*, § 514. Nor will an acceptance be presumed from the circumstance of the rent having been paid, not by the original tenant, but by a third person. *Copeland v. Watts*, 1 Stark. 95.

¹ *Slocum v. Branch*, 5 Cranch, C. Ct. 315.

² *Walls v. Atcheson*, 3 Bing. 462. The necessity of a written surrender is dispensed with where a lessee quits in the middle of a term, and the lessor lets the premises to another; and a surrender of the term is effected by any other new arrangement between the parties, which is inconsistent with the former relation of landlord and tenant. *Peter v. Kendal*, 6 B. & C. 703.

³ *Bees v. Williams*, 2 Cr. M. & R. 581.

⁴ *Griffith v. Hodges*, 1 C. & P. 419.

⁵ *Smith v. Mapleback*, 1 T. R. 441.

under-tenant as his tenant, with the lessee's assent, but there was no surrender in writing of the lessee's interest, and the rent being subsequently in arrear, the landlord distrained on the under-tenant, it was held that these circumstances constituted a valid surrender of the lessee's interest.¹ But a deed executed between landlord and tenant, reciting "that it had been agreed that the tenant should quit and deliver up the premises, that a valuation of his effects upon the premises should be made, which, in the meantime, were to be assigned, and which accordingly were assigned to trustees for the landlord," operated as a conditional surrender only.²

§ 517. To discharge Tenant, Agreement to Substitute must be mutual.—The agreement to substitute must like other contracts be mutual, otherwise the tenant will not be discharged from his liability.³ As, where two partners agree to hold for three years, with power to extend the term to seven, on notice: before the expiration of the three years, or any notice had been given, one of the partners retired, and another was admitted in his place; notice was afterwards given by the continuing partner for an extension of the term, and the landlord by letter expressed himself willing to grant a new lease to him and the new partner, but the letter was not communicated to the retiring partner, so that the agreement was not mutual, nor was any lease prepared; the landlord received rent, first from the continuing partner alone, and afterwards from him and the new partner: but the retiring partner was held not to be discharged from his liability for rent during the remainder of the three years.⁴ And if there is any fraudulent concealment on the part of an outgoing tenant, a surrender will not be allowed to take effect,—as, if he conceals the

¹ Thomas *v.* Cook, 2 B. & A. 119; Walker *v.* Richardson, 2 M. & W. 882. So on the other hand where the tenant surrenders, and the sub-tenant who had offered to surrender quits the premises, it is held to be a surrender. Pratt *v.* Richards Jewel Co., 69 Pa. St. 53.

² Coupland *v.* Maynard, 12 East, 134.

³ Bedford *v.* Terhune, 30 N. Y. 453.

⁴ Graham *v.* Whichelo, 1 Cr. & M. 188; Beall *v.* White, 94 U. S. 382. But in Kinsey *v.* Minnick, 43 Md. 112, after such a change of partners, a surrender will be presumed at the end of the term.

fact that the party introduced by him has compounded with his creditors.¹ Nor will such a surrender be allowed to operate injuriously upon the rights of third persons; and therefore a tenant cannot, by a surrender of his lease to his landlord, affect the estate or rights of his sub-lessee.²

§ 518. Effect of, on Rights of Parties.—The effect of a surrender is, to terminate the relation of landlord and tenant, and with it all the obligations of the parties to that relation; but it will not discharge the lessee from the payment of rent already due.³ And in order to guard against the consequences which might otherwise result from a surrender, in discharging an under-lessee from the payment of rent, and the conditions and covenants annexed to the lease, in cases where he cannot be persuaded to concur in the arrangement, the statute of 4 Geo. II. c. 28 provided that if a lease be surrendered in order to be renewed, and a new lease given, the relation of landlord and tenant, between the original lessee and his under-lessee, should be preserved; and it placed the chief landlord and his lessees and the under-lessee, in reference to rents, rights, and remedies, exactly in the same situation as if

¹ *Bruce v. Ruler*, 2 Mann. & R. 3.

² *Shep. Touch.* 301; *McKenzie v. Lexington*, 4 Dana, 129. See *Lennen v. Lennen*, 87 Ind. 130. But although a tenant who has made an under-lease cannot by a surrender prejudice his tenant's interests, yet he will himself lose the rent he has reserved upon the under-lease; for since rent is an incident to the reversion, the surrenderor cannot collect it, because he has parted with his reversion to the lessor; nor can the surrenderee have it, because, although the reversion to which it was incident has been conveyed to him, yet as soon as it was so conveyed, it merged in the greater reversion of which he was already possessed, and the consequence is, that the under-lessee holds without the payment of any rent, except where the contrary has been expressly provided by statute. See *Mellor v. Watkins*, L. R. 9 Q. B. 400.

³ *Shepard v. Merrill*, 2 Johns. Ch. 276; *Sperry v. Miller*, 8 N. Y. 336; *Learned v. Ryder*, 61 Barb. 552. Nor his surety: *McKensie v. Farrell*, 4 Bosw. 192; *Kingsbury v. Westfall*, 61 N. Y. 255. Nor will it defeat the rights of a mortgagee. *Allen v. Brown*, 60 Barb. 39. In Minnesota, under G. S. 1878, c. 41, § 10, in case of a part surrender the landlord may recover rent for the portion not surrendered. See *Smith v. Pendergast*, 26 Minn. 318.

no surrender had been made.¹ In those States in which this provision has not been adopted, the question may arise how far the under-tenant (whose derivative estate still continues) is discharged from the rents and covenants annexed to his tenancy, in which, as Chancellor Kent intimates, upon the authority of the English cases, that inequitable result is indicated.²

SECTION VI.

CONTINGENT MODES OF DISSOLVING A TENANCY.

(a.) *Premises taken for Public Use.*

§ 519. **Legal Taking avoids outstanding Lease.**—In addition to the several methods of dissolving a tenancy which have been mentioned, it remains to be observed that a lease for years, made by a disseisor or other wrong-doer, is absolutely determined by the entry of the disseehee, or rightful possessor. But if the disseehee confirms the lease when out of possession,

¹ 4 Kent, Com. 103. Similar provisions have been adopted in New York by statute. 1 N. Y. R. S. 744.

² 4 Kent, Com. 103; Thier *v.* Barton, Moore, 94; Webb *v.* Russell, 3 T. R. 401. The effect of this statute, while it gives a lessee the right to surrender, notwithstanding his contracts with his under-lessee, is to leave untouched the sub-interest, though it be merely an agreement for an under-lease; and the effect of a new demise, after the surrender for the residue of the original term, is to make the new lessee the assignee of the reversion of the terms created by the surrenderor. Cousins *v.* Phillips, 3 Hurlst. & C. 892. It is held in case of a surrender and new lease that the landlord's lien created by the former lease is not postponed by a mortgage made by the tenant before surrender and of which the landlord was ignorant. Rollins *v.* Proctor, 56 Iowa, 326. It is held that a lessor who, in consideration of assignment to him, by the lessee, of certain under-leases of parts of the premises, accepts from the lessee a surrender of the original lease, without prejudice to the leases of parts of the premises assigned, may maintain an action against a sub-lessee for rent accruing after the assignment; since when a lease is assigned without the reversion, the privity of contract is transferred, and the assignee may sue in his own name for the rent accruing after the assignment. Beal *v.* Boston Car Spring Co., 125 Mass. 157.

he cannot, after entry, avoid it, because he has by his confirmation parted with so much of his prior right as to deprive himself of the power of avoiding it.¹ And whenever the estate which a lessor had at the time of making the lease is defeated, or in any other manner legally determined, the lease is extinguished with it.² If, therefore, a lot of land, or other premises under lease, is required to be taken for city or other public improvements, the lease, upon confirmation of the report of the commissioners of estimate and assessment, becomes void.³ And in the event of closing up a street or road on which the leased premises are situated, if they are no longer upon or contiguous to a public highway, the lease becomes void.⁴ But if only a part of the lot is taken for such purposes, the lease is not thereby extinguished, even *pro tanto*, except by force of a statute, nor is the lessee discharged of his liability to pay rent for the residue of the term; but the lessor and lessee are

¹ 1 Co. 147, a; Bac. Abr. Lease, 1.

² Harvey's Case, 4 Leon. 161. And where by the statute the land taken "vested" in the city, though taken for a temporary purpose, the lease did not revive on a reconveyance by the city to the lessor. O'Brien *v.* Ball, 119 Mass. 28. In general the relation of landlord and tenant is destroyed by a judgment of eviction against the tenant, by one having a superior title. Thus, a judgment of foreclosure defeats the mortgagor's lease as well as the equity of redemption; the lessor's title being cut off, the lease executed by him becomes void. Burr *v.* Stenton, 43 N. Y. 377. It was also held in this case that there being but a limited covenant of quiet enjoyment, the lessee had no right to a proportionate share of the surplus proceeds of the foreclosure sale; but in Clarkson *v.* Skidmore, 46 N. Y. 297, that if that covenant were a general one he would be so entitled. Without an actual eviction, the tenant may purchase in the better title for his own protection; but such is not the case where successful resistance could have been made to the recovery, or the tenant has neglected to give notice to his landlord of the suit for possession. Mills *v.* Peed, 16 Ky. 180; and see *post*, §§ 705-707.

³ Barclay *v.* Pickles, 38 Mo. 143. In Massachusetts this is held to occur from the date of the order. Edmands *v.* Boston, 108 Mass. 538. Hence, if the lease expires before the actual taking the tenant is still entitled to damages. *Id.* But it is held that the mere taking of land for a public street by a municipal corporation, does not, at least until actual eviction, determine the estate of a tenant at will of such land, the corporation taking an easement only. Emmes *v.* Feeley, 132 Mass. 346.

⁴ 2 N. Y. Rev. Laws, 1813, p. 417, and Laws of 1824; Mills *v.* Baer, 24 Wend. 454; Barker *v.* Hodgson, 3 M. & S. 270.

each entitled to compensation for damage to their respective interests.¹ Nor will the appropriation, by the public canal commissioners, of a mill-privilege, which was the subject of a demise, amount to a discharge of the lessee from his obligations; for he is entitled to compensation for whatever injury he has sustained.² The measure of damages upon such a taking is the present market value of the term;³ considering the length of time it has to run, and any beneficial covenants or rights therein, such as renewal.⁴ But it will not include the good-will or any other special or peculiar value it may have to the tenant.⁵

(b.) *Destruction of Premises.*

§ 520. In Absence of Covenant, extinguishes the Lease.—When the subject-matter of the demise is destroyed by fire or other casualty, as of a house, where the land on which it rests is not rented, or of apartments in the house whether rented for purposes of trade or otherwise, the destruction of the building terminates the relation of landlord and tenant. The lessee

¹ Parks *v.* Boston, 15 Pick. 198; Patterson *v.* Boston, 20 *id.* 159; McLaren *v.* Spaulding, 2 Cal. 510; Workman *v.* Mifflin, 30 Pa. St. 362; Schuylkill Co. *v.* Schmœle, 57 *id.* 271; Chicago *v.* Garrity, 7 Bradw. (Ill.) 474; Foote *v.* Cincinnati, 11 Ohio, 408; although the law is otherwise in Missouri: Biddle *v.* Hussman, 23 Mo. 597; Kingsland *v.* Clark, 24 *id.* 24; and in New York by statute: Gillespie *v.* Thomas, 15 Wend. 467. In Dyer *v.* Wightman, 66 Pa. St. 425, however, while recognizing the title of the tenant to compensation for his term, it was held that the equitable rule was that the value of the term yet to expire should be paid to the lessor to hold, to indemnify him for the land taken, and that thereupon the lease was determined.

² Folts *v.* Huntley, 7 Wend. 210.

³ Edmands *v.* Boston, *supra*; Gillespie *v.* Thomas, 15 Wend. 464; Turner *v.* Williams, 10 *id.* 139; Coutant *v.* Catlin, 2 Sandf. Ch. 485; Cobb *v.* Boston, 109 Mass. 438; Lawrence *v.* Boston, 119 *id.* 126. In Massachusetts the statute provides for the apportionment of damages awarded for the taking of land for a highway, in which land there subsist distinct or separate interests, and lessees are deemed to have taken their titles subject to the provision. See Turner *v.* Robbins, 133 Mass. 207.

⁴ Matter of William, &c., St., 19 Wend. 678.

⁵ Cobb *v.* Boston, Lawrence *v.* Boston, *supra*.

in such cases takes only such an interest in the subjacent land as is necessary to the enjoyment of the leased premises, and upon their destruction by fire, he has no interest in the land of which an eviction can be predicated, and the subject-matter of the demise has ceased to exist.¹ This principle was recognized in a case where a lease for years was made of certain apartments in the basement of the Exchange, in the city of New York, previous to the destruction of that building by the great fire of 1835. Upon the rebuilding of the Exchange, the lessees applied to be let into possession of similar apartments in the basement, on the ground that their lease had not yet expired; but the court held that the lease was extinguished by the destruction of the premises, and that they had no interest in the new building.² In the absence of a special agreement, the tenant is, of course, not bound to continue the payment of rent under these circumstances; and where it is stipulated in the lease that if the property should be damaged by fire, so as to render it untenantable, the rent should cease, the happening of the contingency will terminate the lease and absolve the tenant.³

¹ *Graves v. Berdan*, 26 N. Y. 498; *Ainsworth v. Ritt*, 38 Cal. 89; *Buschman v. Wilson*, 29 Md. 553.

² *Kerr v. Merch. Exch. Co.*, 3 Edw. Ch. 315. To the same effect in *McMillan v. Solomon*, 42 Ala. 356; *Winton v. Cornish*, 5 Ohio, 477; *Andrews v. Needham, Noy*, 75; *Ewer v. Heydon*, Cro. El. 656; *Alexander v. Dorsey*, 12 Ga. 12; though the rent may have been paid in advance: *Stockwell v. Hunter*, 11 Met. 484; *Womack v. McQuarry*, 28 Ind. 103; *Ainsworth v. Ritt*, 38 Cal. 259; *Shawmut Bk. v. Boston*, 118 Mass. 125. But the English law seems otherwise. *Izon v. Gorton*, 5 Bing. N. C. 501. In Louisiana, the failure of a lessor to maintain the premises in tenable condition determines the lease. *Coleman v. Haight*, 14 La. Ann. 564.

³ *Graves v. Berdan*, *supra*; *Buschman v. Wilson*, *supra*. But where a lease provided that in case the buildings should be "destroyed and burned down," and the lessor should not rebuild within a reasonable time, the lessee might terminate the lease; it was held that a partial destruction by fire, that could be repaired without rebuilding, was not within the meaning of this clause. *Vanderpool v. Smith*, 2 Daly, 135.

(c.) *Using the Premises for an Illegal Purpose.*

§ 521. When immoral User of the Premises avoids the Lease.

— Upon general principles, a contract which provides for doing anything which is contrary to law, morality, or public policy, is void.¹ It was therefore held, where the owner of a race-course knowingly let it for public races, with booths and stands for the accommodation of gamblers and disorderly persons, that the lease was void and no rent could be recovered thereon.² We have seen that a similar result follows the making of a lease for the purpose of avoiding the usury law, or of a general restraint of trade. So a lease of premises made for purposes of prostitution, or other immoral object, is absolutely void.³ And the doctrine has been carried so far as to prevent a landlord's recovery of rent for the use of premises, which have been occupied with his knowledge for the purpose of prostitution, though not originally let for that purpose.⁴ But the better opinion seems to be that if the original agreement was honest, and the lessor had no knowledge of facts from which he might reasonably infer an intention on the part of the lessee to use the premises for such a purpose, and the premises are subsequently applied to vicious uses, without the landlord's connivance; or if the woman merely lodges there, and receives her visitors elsewhere, the lease is not thereby avoided at common law.⁵ By statute, in

¹ Russell *v.* De Grand, 15 Mass. 39; Shiffner *v.* Gordon, 12 East, 304.

² Holmes *v.* Maddox, 2 Cranch, C. Ct. 161. To the same effect is Trask *v.* Wheeler, 7 Allen, 109.

³ Girardy *v.* Richardson, 1 Esp. 13. A landlord who lets his premises to a woman of ill-fame, knowing her to be such, with the intent that the same shall be used for the purpose of prostitution, and they are so used, is indictable at common law. Commonwealth *v.* Harrington, 3 Pick. 26; and see Same *v.* Willard, 22 *id.* 478; Boardman *v.* Merr. M. F. I. Co., 8 Cush. 584; Commonwealth *v.* Moore, 11 *id.* 600. See *post*, §§ 644, 728 *a.*

⁴ Jennings *v.* Throgmorton, Ry. & M. 251. An agreement to pay for the repairs of a house of this description was, in England, held to be so tainted with the immoral purpose that the lessor was not allowed to recover. Smith *v.* White, L. R. 1 Eq. 626.

⁵ Appleton *v.* Campbell, 2 C. & P. 347. There is no implied covenant that if a house be kept in a noisy or disorderly manner, or as a house of

New York, however, if the lessee of any dwelling-house shall be convicted of keeping a bawdy-house, the lease or agreement for letting the same becomes void, and the landlord may enter upon the premises so let, and is entitled to the same remedies to recover possession as are given by law in case of a tenant holding over after the expiration of his lease.¹ And the statute in that State formerly authorized the owner or landlord of any premises used or occupied as a bawdy-house, or house of assignation for lewd persons, or for any other illegal trade, manufacture, or business, to take summary proceedings for the removal of the occupants therefrom, in the same manner as if they were tenants holding over. The lease was declared to be void in either case, and if the owner or landlord in the case of the disorderly house neglected to institute such proceedings, after having been notified and requested by any tenant or owner of property in the immediate neighborhood so to do, the party giving such notice might take the proceeding.² It was therefore no more the duty or the right of a landlord than of any other person to abate a nuisance of this description, if aggrieved.³ In Ohio, any person who permits a house owned by him to be used as a house of ill-fame, is guilty of a misdemeanor, and if any tenant so uses a house, the landlord may enter and avoid the lease.⁴ In Massachusetts, while the lease may be avoided by the lessor if used for an unlawful purpose by the lessee,⁵ if on the other hand such unlawful purpose is shared in by the lessor when demising, or

prostitution, the landlord may re-enter. *Miller v. Forman*, 8 Vroom, 55; *Updike v. Campbell*, 4 E. D. Smith, 570; and see *O'Brien v. Brietenbach*, 1 Hilt. 304.

¹ 2 R. S. 702, § 29. In Louisiana, a lessor may rescind a lease, where the building is used for a purpose not contemplated by the parties at the time of entering into the contract, and which is injurious to him. *Caffin v. Scott*, 7 Rob. (La.) 205.

² Laws of 1868, p. 1724; Laws of 1873, c. 583; and see *post*, § 728 a. By c. 245, Laws of 1880, the last clause of § 1 of the Laws of 1873 is repealed, and the lessor's only remedy is by ejectment. *Shaw v. McCarty*, 11 Daly, 150; s. c. 63 How. Pr. 286; *People v. Same*, 62 *id.* 152.

³ *Gilhooly v. Washington*, 4 N. Y. 217; *O'Brien v. Brietenbach*, *supra*.

⁴ *State v. Crofton*, 25 Ohio, 249.

⁵ Mass. Pub. Stat. c. 101, § 8; *Prescott v. Kyle*, 103 Mass. 389.

connived at after the lease is made, the lease is void, and no recovery can be had even against an assignee.¹ But a lease cannot be avoided on the ground that it was obtained by the fraudulent misrepresentation of the lessee, as to matters collateral to the lease; as that he was a respectable person and intended to use the premises for a respectable business, whereas he was not a respectable person, and intended at the time, and did afterwards use the premises for an immoral and illegal purpose.²

(d.) *Tenant's Disclaimer.*

§ 522. **What. — When it avoids the Lease.** — We have seen, when discussing the subject of a forfeiture of the term, that a tenant would at common law forfeit his estate by such acts as indicate the assumption of a position hostile to his landlord.³ One of these grounds of forfeiture, to wit, a conveyance by the lessee of an estate greater than his own,— which, however, never applied to conveyances operative under the Statute of Uses,⁴— has been removed by statute in most of the United States.⁵ It was no ground of forfeiture of a lease for years at common law, though it is sometimes said to have been so, that a lessee had verbally asserted his own title to the premises, and on that ground refused to pay rent.⁶ Cer-

¹ Mass. Pub. Stat. c. 101, § 9; *Sherman v. Wilder*, 106 Mass. 537; *Simpson v. Wood*, 105 *id.* 263. It is no defence for a married woman who is indicted under the Massachusetts statute, c. 87, § 7, for keeping a house of ill-fame, that her husband resided in the house, and hired, furnished, and provided for it. *Commonwealth v. Cheney*, 114 Mass. 281. A business is not necessarily licensed or protected because of its being taxed, nor does taxing a business imply an approval of it. *Youngblood v. Sexton*, 32 Mich. 406. In Rhode Island, the unlawful user makes the lease void, and the estate reverts without any act of the owner. See *Almy v. Greene*, 13 R. I. 350.

² *Ferret v. Hill*, 15 C. B. 207.

³ *Ante*, § 488.

⁴ *Jackson v. Mancius*, 2 Wend. 357; *Grout v. Townsend*, 2 Hill, 554.

⁵ 1 N. Y. R. S. 739, § 143; 4 Kent, Com. 104; Mass. Gen. Stat. c. 89, § 9.

⁶ *Doe v. Wells*, 10 Ad. & E. 427; *Delancy v. Ganong*, 9 N. Y. 9; *Rees v. King, Forrest*, Exch. 22.

tainly a mere denial of the landlord's title by parol or the payment of rent to a stranger, will, in neither case, taken singly, now amount to a forfeiture of the term.¹ But if the tenancy is from year to year, or at will, the law is otherwise, for these tenancies are always determinable by notice, and as notice would be waived by a denial of the relation of landlord and tenant, the tenancy is in fact forfeited.² So will a lease for years be forfeited by a fraudulent attornment, as by the tenant's accepting a lease from a stranger, and on that ground refusing to pay rent.³ But independently of the common-law doctrine of forfeiture, it is now held in several of the United States that if a tenant, even by mere words, distinctly repudiates the lessor's title, and asserts one in himself; and this is made known to the lessor, the tenant's holding becomes adverse; and as this would in due time ripen into a fee by adverse possession, he will at once become a trespasser, liable to ejectment, or to summary process by the lessor, his tenancy, whether for years or at will, being forfeited.⁴

¹ *Id.* Doe d. Dillon *v.* Parker, 180.

² Doe *v.* Long, 9 C. & P. 773; Doe *v.* Grubb, 10 B. & C. 816; Doe *v.* Rollings, 4 C. B. 188; Doe *v.* Evans, 9 M. & W. 48; Doe *v.* Gower, 17 Q. B. 589; Bolton *v.* Landus, 27 Cal. 104; Duke *v.* Harper, 6 Yerg. 280; Brown *v.* Keller, 32 Ill. 152; Smith *v.* Ogg Shaw, 16 Cal. 88; Doe *v.* Frowd, 4 Bing. 557. For an extreme application of the rule, see Vivian *v.* Moat, 16 Ch. D. 730. The rule is otherwise where the title is in controversy, and the tenant refuses to pay until it is settled: Jones *v.* Mills, 10 C. B. n. s. 788.

³ Doe *v.* Pittman, 2 Nev. & M. 673; Doe *v.* Flynn, 1 Cr. M. & R. 137; but not until made known to the lessor: Doe *v.* Reynolds, 27 Ala. 364, 376; and see Russell *v.* Fabyan, 34 N. H. 223.

⁴ This seems the law in the United States courts. Willison *v.* Watkins, 3 Pet. 43; and see Peyton *v.* Stith, 5 *id.* 485, 491; Walden *v.* Bodley, 14 *id.* 156; Zeller *v.* Eckert, 4 How. 289; the law being laid down without limitation as to the character of the tenancy, and on principle, there seems no reason for any discrimination; *Vermont*: per Redfield, C. J., Sherman *v.* Champl. Tr. Co., 31 Vt. 177; Hall *v.* Dewey, 10 *id.* 593, 599; Greeno *v.* Munson, 9 *id.* 37; Briggs *v.* Oakes, 26 *id.* 145; *New York*: in an early case, Jackson *v.* Vincent, 4 Wend. 633, though controverted in Delancy *v.* Ganong, 2 N. Y. 9; *Illinois*: Fortier *v.* Ballance, 5 Gilm. 41; Fusselman *v.* Worthington, 14 Ill. 135; Wall *v.* Goodenough, 16 *id.* 415; Doty *v.* Burdick, 83 *id.* 473; *South Carolina*: Trustees *v.* Meetze, 4 Rich. Law, 50, 52; *California*: Van Winkle *v.* Hinkle, 21 Cal. 342; but some

overt act is necessary: *Abby H. Assoc. v. Willard*, 48 Cal. 614; *Pennsylvania*: *Newman v. Rutter*, 8 Watts, 55; *Kentucky*: *Montgomery v. Craig*, 5 Dana, 101; *Kansas*: where the tenant repudiating the lease and disclaiming is held estopped to set up the creation of a new tenancy by lapse of time occurring through the landlord's laches, or to create a new title by re-entry; *Douglass v. Anderson*, 32 Kan. 350; *Same v. Geiler*, *id.* 500; and, perhaps, *Virginia*: *Allen v. Paul*, 23 Gratt. 332. The rule stated in the text does not of course apply to the case of a person holding under an agreement which it was not the intention of the parties should constitute the relation of landlord and tenant. *Hughes v. Clarksville*, 6 Pet. 369. Nor where the tenant during the term encroaches by taking in more of the lessor's land than the demise gave him. *Whitmore v. Humphries*, L. R. 7 C. P. 1. Nor where the disclaimer is not made known to the landlord. *Campbell v. Shippen*, 42 Md. 81; *Stacy v. Bostwick*, 48 Vt. 192. And in a case in *Maine*, the tenant was held to be estopped, though the landlord had elected to treat himself as disseised by the tenant's disclaimer, which was open and adverse. *Longfellow v. Longfellow*, 61 Me. 590.

CHAPTER XII.

THE CONSEQUENCES OF A DISSOLUTION.

§ 523. Respective Rights of Parties on Termination of Tenancy.—The tenancy being ended, the right of possession reverts to the landlord, who may at once re-enter upon the premises. But if the tenant continues to hold over, and the landlord breaks in upon him forcibly, so as to endanger a breach of the peace, he runs the risk of an indictment, though not of an action of trespass, at the suit of the tenant, unless he uses excessive force.¹ And he may remove the tenant or his goods and chattels with reasonable force.² The tenant, on the other hand, is bound quietly to yield possession of the premises to his landlord, although he still retains a reasonable right of egress and regress, for the purpose of removing his goods and chattels.³ He may also, in certain cases, as we

¹ *Rex v. Smith*, 1 Mood. & R. 155, per Ld. Tenterdén; *Commonwealth v. Haley*, 4 Allen, 318; *Taunton v. Costar*, 7 T. R. 431; *Newton v. Harland*, 1 M. & G. 664, per Coltman, J. An indictment lay at common law before the statutes of forcible entry and detainer, but title was a good defence. 1 Hawk. P. C. 495 (8th ed.). By statutes 5 & 15 Rich. II., 8 Hen. VI., and 21 James I., forcible entry and detainer, even by one having title, was indictable, and restitution awarded on conviction. *Id.* For a notice of these statutes and similar enactments in the United States, see 4 Am. Law Rev. 429. Trespass for assault was also maintainable by the tenant, if undue force was used. *Sampson v. Henry*, 11 Pick. 379; *Todd v. Jackson*, 26 N. J. 525; but not trespass *quare clausum* for the violent entry. *Same v. Same*, 13 *id.* 36; *Meader v. Stone*, 7 Metc. 147; *Ives v. Ives*, 13 Johns. 235. If the term had not ended, the landlord is liable in trespass for his entry, though the tenant had removed. But if no actual damage or malice is shown, only nominal damages are awarded. *Shannon v. Burr*, 1 Hilt. 39. See further, §§ 531, 532.

² *Low v. Elwell*, 121 Mass. 309; *Stearns v. Sampson*, 59 Me. 568.

³ *Simpkins v. Rogers*, 15 Ill. 397. This rule applies to a tenant at will, as well as to a tenant for years. *Folsom v. Moore*, 19 Me. 252.

shall see presently, have a right to take the emblements or annual profits of the land after they shall have matured; and, unless restricted by some positive agreement to the contrary, may remove such fixtures as he has erected during his occupation, for his comfort, convenience, or profit. We shall, in this chapter, treat of each of these subjects in their order.

SECTION I.

THE LIABILITY OF A TENANT HOLDING OVER.

§ 524. Duty of, to surrender.—Liability for Rent continues. — As soon as the tenancy has expired, the tenant ought peaceably and quietly to surrender the premises, with all such improvements, buildings, and fixtures as belong to them,¹ to the landlord or his assignee;² and his refusal to do so will not only render him liable to certain penalties imposed by law, but after entry or demand to be treated as a trespasser.³ And

¹ The word "improvement," as used in a lease, embraces every addition, alteration, erection, or annexation made by the lessee during the term for his own use. It is more comprehensive than the word "fixtures," which is necessarily included in it. *French v. Mayor*, 16 How. Pr. R. 220.

² It is, however, held in Missouri, that where the assignee is a purchaser of the landlord's title, the right of possession upon the expiration of the term does not follow the title, but reverts to the landlord, and that the tenant holds for him; so that if the purchaser has obtained possession without the tenant's consent, he is liable in forcible entry and detainer to the landlord. *May v. Luckett*, 54 Mo. 437; *Kingman v. Abington*, 56 *id.* 46; *Krank v. Nichols*, 6 Mo. App. 72. Although it is held by the same court that the tenant may show the landlord's title determined by the same sale. *Kingman v. Abington*, *supra*; *Gunn v. Sinclair*, 52 Mo. 327. It is not known that a similar doctrine prevails elsewhere.

³ *Dorrell v. Johnson*, 17 Pick. 263; *Meno v. Hoeffel*, 46 Wisc. 282; *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158; *Fitzpatrick v. Child*, 2 Brewst. 365. In Louisiana, where a landlord, instead of resorting to the means provided by law for obtaining possession of his premises, takes upon himself without authority to turn out the tenant and his family, he will be liable in damages, and it will be no excuse for him that the removal was effected without violence or injury. *Thayer v. Littlejohn*, 1 Rob. (La.) 140.

although he may have expended money on the improvement of the premises, under an agreement with his landlord to be reimbursed therefor, he has still no right to hold over until he is indemnified.¹ If he has let the whole or any part of the premises to an under-tenant, who is in possession at the termination of the lease, he must get him out; otherwise, he will not be in a situation to render that complete possession to which the landlord is entitled. And unless the entire possession is delivered up, the tenant's responsibility for rent will continue, although it may have become impossible for him to give the landlord full possession, in consequence of the obstinacy or ill-will of an under-tenant, to whom he has let a part or the whole of the premises, and who refuses to quit; for in such case the landlord may refuse to accept possession, and hold the original tenant liable.² Where an under-tenant held over after the expiration of a term, against

¹ Speers *v.* Flack, 34 Mo. 101; Allison *v.* Thompson, 1 Litt. 31. See Kellogg *v.* Groves, 53 Iowa, 395. But where a lessee was to be paid for his improvements, and *on being paid* agreed to yield up the demised premises, an agreement may be implied that he should retain possession until payment was made, although the term may have expired. Van Rensselaer *v.* Penniman, 6 Wend. 569. So where his mortgage title accrues on the day when the lease expires, he need not deliver possession. Shields *v.* Lazear, 34 N. J. 491. If he has covenanted to deliver possession at the end of the term he is not in default until after a demand of possession. Bowling *v.* Ewing, 3 A. K. Marsh. 610; Kyle *v.* Proctor, 7 Bush, 493. A mere continuance in possession is not a refusal to restore the possession, nor a fact from which a jury can infer a refusal. Richardson *v.* Langridge, 4 Taunt. 128; Whitlock *v.* Duffield, 2 Hoff. 366; Edwards *v.* Hale, 9 Allen, 462.

² Harding *v.* Crethorn, 1 Esp. 57; Dimock *v.* Van Bergen, 12 Allen, 551; Burnham *v.* Martin, 90 Ill. 438. But such derivative occupants may show that they do not occupy as under-tenants, but as boarders, or part of the tenant's family. Theo. Inst. *v.* Barbour, 4 Gray, 329; Knowles *v.* Hull, 99 Mass. 562. And leaving dirt or rubbish on the place is no continued occupancy so as to waive a notice to quit: Wilson *v.* Prescott, 62 Me. 115; or imply a holding after the term has expired: Thorndike *v.* Burrage, 111 Mass. 531. So the non-removal of one or two articles is no continuance of the tenancy, if the tenant has gone himself. Thomas *v.* Frost, 29 Mich. 336. In a parol demise there is an implied contract on the part of the tenant, that at the expiration of the tenancy he will deliver up the full possession of the entire premises to the landlord. Henderson *v.* Squire, 10 B. & S. 183.

the will of the lessee, and, during the holding over, the lessee distrained for rent previously due,— it was held that the lessee was liable for rent during the period of the holding over, but not for a whole year's rent, as a tenant who holds over does not necessarily become a tenant from year to year.¹ The landlord may, indeed, discharge the original lessee, by accepting the under-tenant as his immediate lessee ; but the mere circumstance of his signing a notice, by which a tenant whose term has expired orders his under-tenant to pay the rent to him in future, is not evidence of his agreement to accept him as a tenant, unless it appears that he knew and understood the contents of the notice.² And whenever a tenant remains in possession, it is a question for a jury to determine whether he intends to continue the tenancy.³

§ 525. Bound by Terms of the original Demise. — Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the original demise, subject to the same rent, and to all the covenants of the original lease, so far at least as they are applicable to the new condition of things.⁴ If the lease contained covenants for particular modes

¹ Ibbs *v.* Richardson, 9 Ad. & E. 849; Waring *v.* King, 8 M. & W. 571. So, where a tenant had agreed in his lease to go when the premises were sold, he was held liable to the purchaser in an action on the case for not delivering up the premises. Moore *v.* Davis, 49 N. H. 45.

² Harding *v.* Crethorn, *supra*.

³ Jones *v.* Shears, 4 Ad. & E. 832; Wolz *v.* Sanford, 10 Bradw. (Ill.) 136. And if a tenant continues in possession under an agreement, express or implied, for a new lease, he becomes a tenant at will until the lease is executed; but if no such agreement is made, he is only a tenant at sufferance. Emmons *v.* Scudder, 115 Mass. 367; Merrill *v.* Bullock, 105 *id.* 486. In Maine, a tenant holding over by consent is a tenant at will, and liable for rent only so long as he occupies the premises. Kendall *v.* Moore, 30 Me. 327.

⁴ Salisbury *v.* Hale, 12 Pick. 416; Brewer *v.* Knapp, 1 Pick. 332; Weston *v.* Weston, 102 Mass. 514; Hunt *v.* Wolfe, 2 Daly, 298; Webber *v.* Shearman, 3 Hill, 547; Schuyler *v.* Smith, 51 N. Y. 309; Davis *v.* Mayor, &c., 45 N. Y. S. C. 373; Bacon *v.* Brown, 9 Conn. 338; Noel *v.* McCrory, 7 Coldw. 623; Clapp *v.* Noble, 84 Ill. 62; Holley *v.* Metcalf, 12 Bradw. (Ill.) 141; Laguerenne *v.* Dougherty, 35 Pa. St. 45; De Young

of husbandry, and after the expiration of the lease the tenant holds over and pays rent, the landlord may compel him to perform such covenants in the same manner as if they were still expressly agreed to be continued between them.¹ And the tenant's liability in this respect will continue on the original lease, notwithstanding an undertaking on his part to pay a

v. Buchanan, 10 G. & J. 149; *Moore v. Beasley*, 3 Ohio, 294; *Finney v. St. Louis*, 39 Mo. 177; *Sears v. Smith*, 3 Col. 287; *Bonney v. Foss*, 62 Me. 248. A renting by an agreement in writing, but not under seal, for a term of five years, is effectual only as a demise for one year, § 80, *ante*; but if continued without notice from either party to terminate the holding for the five years, it is held that this becomes in effect a parol demise from year to year during the holding, and each parol demise from year to year becomes a distinct and complete cause of action, and will be barred after three years by the Statute of Limitations. *Stewart v. Apel*, 5 Houst. 189. In *Despard v. Walbridge*, 15 N. Y. 374, the tenant being notified by lessor's assignee that if he held over he must pay an increased rent, was held to have assented thereto by merely continuing to occupy after his lease expired. See *Lore v. Pierson*, 10 Daly, 272. So *Hunt v. Bailey*, 39 Mo. 267; *Adriance v. Hafkemeyer*, *id.* 134; *Dorril v. Stephens*, 4 McCord, 59; *McKinney v. Peck*, 28 Ill. 174; *Reithman v. Brandenburg*, 7 Col. 480; *Love v. Law*, 57 Miss. 596; *Allen v. Bartlett*, 20 W. Va. 46; *Brown v. Kayser*, 60 Wisc. 1; *Bennett v. Ireland*, Ellis, B. & E. 326. But this principle was held not to apply where a tenant succeeded a prior tenant, and agreed for a certain rent, but paid only what the former tenant had paid; and lessor was allowed to recover the balance of rent agreed to be paid. *Mayor v. Tyler*, 8 Q. B. 95. A provision in the lease for the payment of double rent for every day of the holding over is held to be waived by payment and acceptance of rent on the old terms. *Deaver v. Randall*, 5 Mo. App. 297; *Wilgus v. Lewis*, 8 *id.* 336. A tenant who, without the landlord's consent, surrenders to another who holds over, is liable for such double rent. *Kerr v. Simmons*, 8 Mo. App. 431. A confession of judgment in a lease for a term certain has reference to that particular term only, and does not authorize the entry of judgment for rent accruing after the expiration of the term where the tenant has held over, since when the rent for the term was paid the judgment was paid, and the implied renewal could not revive the judgment. *Smith v. Pringle*, 100 Pa. St. 275. Holding over and paying rent is held an exercise of the lessee's option to renew. *Ins. Co. v. Bk. of Missouri*, 5 Mo. App. 333.

¹ *Roe v. Ward*, 1 H. Bl. 97; *Doe v. Amey*, 12 Ad. & E. 476; *Hyatt v. Griffiths*, 17 Q. B. 505; and see *Martin v. Smith*, 22 W. R. 336. The tenant's holding over will not extend the time for the performance of the covenants contained in the original lease. *Pollman v. Morgester*, 99 Pa. St. 611.

larger rent; as, where he had covenanted to repair and insure, and after the lease had run out agreed to pay an increased rent,—the premises being accidentally burnt down, the court held him bound to repair, and that the advance of rent made no difference, for all the other terms of the old lease were in fact incorporated into the new contract.¹ So the agreement of the parties, either before or after the termination of the lease, may control in other respects the terms on which the tenant holds.² And in all cases it is for the jury to say what the terms are.³

§ 526. When a Trespasser.—By Statute.—A tenant at will becomes a trespasser by any unreasonable delay to remove from the premises after his estate is determined; and a tenant for years may be so treated immediately after his term

¹ *Digby v. Atkinson*, 4 Camp. 275; 5 M. & W. 100. See *Stewart v. Putnam*, 127 Mass. 403. As to what is necessary to constitute a binding agreement for a larger rent, see *Hoff v. Baum*, 21 Cal. 120; *Higgins v. Halligan*, 46 Ill. 73. If a tenant holds over, he is bound to pay a proportionately increased rent for structures put on the premises by the landlord during the term. *Abeel v. Radcliff*, 15 Johns. 505. But this is doubted in *Holsman v. Abrams*, 2 Duer, 435. But no increase is allowed for structures built by a tenant. *Newell v. Sanford*, 13 Iowa, 191. And where his former rent was not annual he may show the actual value of the premises. *Evertsen v. Sawyer*, 2 Wend. 507; *Bishop v. Howard*, 2 B. & C. 100; *Doe v. Wood*, 14 M. & W. 682. In Louisiana, where a lessee continues in possession for a week after the expiration of his term, without opposition from the lessor, the lease will be presumed to continue at the same price, and on the same conditions, but for no particular period; and, under the Code, Art. 2655, he will hold by the month, and can only be expelled after fifteen days' notice; and can quit the premises only after giving a similar notice to the landlord. At any time within a week after the expiration of the lease, the tenant may be expelled without notice, or he may leave in like manner. *Bowles v. Lyon*, 6 Rob. (La.) 262; *Mossy v. Mead*, 2 La. 157.

² *May v. Rice*, 108 Mass. 150. Where the holding over is by mutual consent, the tenant's right to remove buildings is not lost. *Neiswanger v. Squier*, 73 Mo. 192.

³ *Oakley v. Monck*, 4 Hurlst. & C. 251. The parties to a lease do not as matter of law continue subject to its terms, when the tenant, against the landlord's will, holds over and continues in possession, and seeks to bind the landlord on provisions of the lease which have become inapplicable. *Ives v. Williams*, 50 Mich. 100.

has ended.¹ But trespass will not lie against a tenant at sufferance, before actual entry by the landlord.² In addition to the common-law liabilities, there are statutory penalties, which a tenant will incur by his neglect or refusal promptly to surrender possession. The statutes of 4 Geo. II. c. 28, and 11 Geo. II. c. 19, declared that if a tenant held over after demand made and notice in writing to deliver up possession, or if he held over after having himself given notice of his intention to quit, he should be liable to pay double rent so long as he continued to hold over. The provisions of these statutes have been re-enacted in New York, and some other States, though they are not generally adopted in this country.³ The statutes referred to declare⁴ that if any tenant for life or for years, or any other person who may have come into possession of any lands or tenements under or by collusion with such tenant, shall wilfully hold over any lands or tenements after the expiration of the term, and after demand made and one month's notice in writing, given in the manner therein prescribed, requiring the possession thereof by the person entitled thereto, the person holding over shall pay to the person kept out of possession, or his representatives, at the rate of double the yearly value of the lands and tenements so detained, for so long a time as he shall hold over, or keep the person entitled out of possession.⁵

§ 527. Demand of Possession a Pre-requisite to Suit.—A demand of possession, and notice to quit, in writing, are necessary in all cases in which the landlord would avail himself of the statute; for though, where premises are underlet for a certain definite period, no notice is required to put an

¹ Ellis *v.* Paige, 1 Pick. 43; Moore *v.* Davis, *supra*; Crommelin *v.* Thiess, 31 Ala. 412; Danforth *v.* Sargeant, 14 Mass. 491. He may be treated as a wrong-doer, and ejected without notice to quit. Den *v.* Adams, 12 N. J. 99.

² Rising *v.* Stannard, 17 Mass. 282.

³ 4 Kent, Com. 115; *Delaware*: Morris *v.* Burton, 1 Houst. 213; *Kentucky*: Thompson *v.* Marsh, 4 Bush, 423.

⁴ 1 R. S. 745, § 10.

⁵ See further as to the construction of this statute and the form and details of the action thereon, *post*, § 622.

end to the tenancy, yet the tenant who holds over beyond that term can only be charged for double rent from the time when a regular notice was served.¹ But proof of service of notice to quit in writing is held to be a sufficient proof of demand ;² and where the holding has been from year to year, the ordinary notice to quit, which is given for the purpose of determining the tenancy, serves as a good demand of possession under the statute.³ An action under these statutes lies not only in favor of the landlord, but also of his legal representatives ; and if the parties entitled to the action are tenants in common, each must bring a separate action for the double value of his moiety ;⁴ for they cannot sue jointly unless there has been a joint demise.⁵

§ 528. Notice to Tenant in Possession required. — When to be given. — The statute referred to requires notice to be given to the tenant in possession ; and the rules relating to service of notice to quit, formerly mentioned, are applicable to this statutory notice. If the notice is given to a single woman as the tenant, and she afterwards marries, the landlord may maintain his action for double rent against her husband, without serving another notice upon him.⁶ The notice ought to be

¹ Cobb *v.* Stokes, 8 East, 358. The statute only applies to those cases where a tenant has the power of determining his tenancy by a notice, and where he has actually given a valid notice, sufficient to determine the tenancy. Johnstone *v.* Huddlestone, 4 B. & C. 922.

² Wilkinson *v.* Colley, 5 Burr. 2694; Poole *v.* Warren, 8 Ad. & E. 582.

³ Hirst *v.* Horn, 6 M. & W. 393.

⁴ Cutting *v.* Derby, 2 W. Bl. 1077.

⁵ Wilkinson *v.* Hall, 1 Bing. N. C. 713. If one tenant in common has taken a lease of his co-tenant and holds over after the expiration of the lease, he will not be presumed to continue in possession under the lease, but to be holding by virtue of his original right as tenant in common, subject to his liability to account to his co-tenant according to law. But if after the term he permits his co-tenant to retain and apply on the lease moneys which, being then due to them both, have been collected by such co-tenant, this is evidence that he still holds under the lease, and is bound to pay rent according to its terms. Rockwell *v.* Luck, 32 Wisc. 70. A tenant in common who rents the share of his co-tenant is not liable to double rent for holding over after notice to quit, if he do no act to keep out his co-tenant. Mumford *v.* Brown, 1 Wend. 52.

⁶ Lake *v.* Smith, 4 B. & P. 174.

given before the expiration of the term, and the landlord will then be entitled to recover double rent, as from the period at which the term expired.¹ It may, however, be given after the expiration of the term ; and if the landlord has done no act acknowledging the continuance of the tenancy, he will be entitled to double rent or value from the time of demand, so long as the tenant continues to hold over. But if the rent is payable quarterly, and the demand be made in the middle of a quarter, he cannot recover single rent for the antecedent fraction of the quarter.² If, after the expiration of the notice, a landlord receives single rent from his tenant, it is a question for a jury to consider, whether he did not thereby intend to waive the notice and re-establish the tenancy ; for in that case the landlord's right to sue for double rent is gone.³ But the bringing of an ejectment suit after service of notice to quit is no waiver of the landlord's right to double rent.⁴

§ 529. Statute Penalty in certain Cases.—Double Rent.—The statute also imposes a penalty upon such tenants as, having the power of terminating their leases by notice, shall notify the landlord to that effect, and afterwards refuse to deliver up possession at the time specified. It declares that if any tenant shall give notice of his intention to quit the premises by him holden and shall not accordingly deliver up the possession thereof at the time specified, the tenant, his executors, or administrators, shall from thenceforward pay to the landlord, his heirs, or assigns double the rent which he should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent ; and such double rent shall be continued to be paid, during all the time the tenant shall continue in possession.⁵ As this statute directs the double rent to be recovered in the same manner as single rent, the landlord may either bring an action of debt for it or he may distrain. A mere verbal lease is considered to be within the meaning of this

¹ *Cutting v. Derby*, 2 W. Bl. 1075.

² *Cobb v. Stokes, supra.*

³ *Doe v. Batten*, Cowp. 243; *Ryal v. Rich*, 10 East, 48.

⁴ *Soulsby v. Neving*, 9 East, 310.

⁵ 1 N. Y. R. S. 745, § 11.

statute ; and verbal notice to quit, by the tenant, is sufficient to make him liable for double rent, in case he holds over.¹ But to bring the tenant under the statute, his notice must be direct and positive ; for in a case where a tenant gave his landlord notice that he would quit upon a contingency, *as soon as he could find another situation*, and he did afterwards find another situation, but neglected to quit the premises, Lord Ellenborough held the notice too vague, and that the case did not come within the statute.² The statute only applies to those cases in which the tenant has the power of determining his tenancy by notice, and where he actually does give a *valid notice* for that purpose.³ It may also be observed that a tenant holding over, after notice to quit on his part, is only liable for double rent during his continuance in possession ; and need not give a fresh notice, after having once paid double rent, in order to get rid of his liability.⁴ The chief differences between these two sections of the statute seem to be that in the former the notice which proceeds from the landlord must be in writing ; but in the other, proceeding from the tenant, it may be a mere verbal notice ; and that the one imposes double rent as a *penalty*, and not as *rent* ; while the other still treats the party as tenant, and recognizes him by that name, which the former does not.⁵

§ 530. Action for Special Damages. — In addition to the penalty of double rent imposed upon the tenant for holding over, the same statute also subjects him to an action for all special damages which the landlord may sustain in consequence of his refusal to deliver possession, by enacting that the tenant “shall also pay and remunerate all special damages whatever to which the person so kept out of possession may be subjected by reason of such holding over ; and there shall be no relief in equity against any recovery had at law under

¹ *Timmins v. Rowlinson*, 3 Burr. 1603; *Wheeler v. Copeland*, 5 T. R. 364; *Sullivan v. Bishop*, 2 Carr. & P. 359.

² *Farrance v. Elkington*, 2 Camp. 591.

³ *Johnstone v. Huddlestome*, 4 B. & C. 922.

⁴ *Booth v. Macfarlane*, 1 B. & Ad. 904.

⁵ *Soulsby v. Neving*, *supra*.

this section."¹ There is likewise, in New York, a further provision against holding over, without express consent, after the determination of their particular estates, by guardians, trustees to infants, and husbands seised in right of their wives, or by any other persons having estates determinable upon any life or lives. They are declared to be trespassers, and liable for the full value of the profits received during the wrongful possession.² This last provision was taken from the statute of 6 Anne, c. 18; but the common law itself held the guardian in such case to be an abator, and gave an assize of *mort d' ancestor* against the disseisor, with an action of trespass against the tenant *pour autre vie* or tenant for years holding over.³

SECTION II.

MUTUAL PRIVILEGES AFTER DISSOLUTION.

§ 531. Forcible Entry by Landlord under Plea of Title. — At common law, any owner of land having a right to immediate possession, might enter and repossess himself by force, if resisted; and if indicted for a breach of the peace, might justify under his title, except for undue or excessive force.⁴ By the statutes of forcible entry and detainer, this defence to an indictment was taken away; but the right of forcible repossession still existed civilly, and the landlord, though indictable for the force, could not be sued in trespass by a tenant holding over, whom he had entered upon and ejected, without excessive force.⁵ But the correctness of this doctrine was

¹ 1 R. S. 745, § 10. This liability seems to exist at common law, independently of the statute. *Bramley v. Chesterton*, 2 C. B. n. s. 592.

² R. S. 749, § 7.

³ 4 Kent, Com. 116.

⁴ 1 Hawk. P. C. 495 (8th ed.). The entry of a landlord to revest the possession must not be merely casual, but with a purpose of claiming and taking possession; and whether such purpose is evinced by the acts and declarations of the parties is a question of fact to be submitted to a jury. *Halsy v. Brown*, 14 Conn. 270.

⁵ *Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 id. 431; *Argent v. Durant*, 8 id. 403; *Co. Lit.* 257, a, Butler's note; per Redfield, J., *Dustin v. Cowdrey*, 23 Vt. 631, 635; *Turner v. Meymott*, 1 Bing. 158; *Butcher v. Butcher*, 7 B. & C. 399.

denied in some later cases, and it was declared that a lessor could, if resisted, neither forcibly enter, nor expel the tenant who was in without right; because, by the statutes of forcible entry and detainer, the act was criminal, and hence could confer no rights at law nor reinvest the landlord with a legal possession; and for such violent entry he was liable to the tenant in trespass *quare clausum*, since the latter's possession had never been legally determined.¹ Or, if the landlord had peaceably entered, his forcible expulsion of the tenant rendered him a trespasser *ab initio*, and equally liable to an action by the latter.² But these cases were subsequently overruled on both grounds, and the law was again established in accordance with the views first stated, the forcible entry of the lessor being held justifiable under a plea of title; and having once reinvested himself with the legal possession by entry, he might treat the tenant as a trespasser, and, if resisted, expel him with reasonable force.³

§ 532. Landlord may enter subject to Indictment for Excessive Force. — Contrary Authority. — The law seems to be well settled in most of the United States in accordance with this

¹ *Hillary v. Gay*, 6 C. & P. 284; *Newton v. Harland*, 1 M. & G. 644.

² *Id.*

³ *Harvey v. Brydges*, 14 M. & W. 437, 442. “I should have no difficulty in saying that where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for forcible entry, he is not liable to the other party also. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed.” Per Parke, B., quoted and approved in *Blades v. Higgs*, 10 C. B. n. s. 713, 721; and this doctrine was followed and established in *Davis v. Burrell*, 10 C. B. 825; *Pollen v. Brewer*, 7 C. B. n. s. 371; *Kavanagh v. Gudge*, 7 M. & G. 316; *Davison v. Wilson*, 10 Q. B. 890, 902; *Burling v. Read*, *id.* 904; *Meriton v. Coombs*, 1 Lowndes, M. & P. 510; *Lows v. Telford*, 1 App. Ca. 414. So *Woodfall, Landl. & T.* 575 (9th ed.). It may be remarked further that *Hillary v. Gay* was a *nisi prius* case, and *Newton v. Harland* affirmed by a divided court.

doctrine of the common law; and the right of the landlord forcibly to enter, and expel the tenant who holds over after the conclusion of his term or the expiration of a notice to quit, subject only to indictment under the statutes for excessive force against the person, is now generally established.¹ But in some States the law of *Hillary v. Gay* and *Newton v. Harland* above referred to has been adopted, and the rule laid down that a lessor, if resisted in his entry or removal of the tenant's goods, must desist and have recourse to his legal remedies for possession; and that if he persists, the tenant may have trespass *quare clausum* against him, as well as trespass for an assault.² This doctrine undoubtedly

¹ *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 *id.* 235. "It is well settled that a person having title, that is, a right to enter, is not liable to an action of trespass for entering with force, although liable to indictment for forcible entry." "This position, apparently harsh, and tending to public disturbance and individual conflict, is abundantly supported by authority, and must be considered the law of the land. Statutes of forcible entry and detainer punish criminally the force, and in some cases make restitution of possession, *but so far as civil remedy goes, there is none whatever.*" Per Nelson, C. J., *Jackson v. Farmer*, 9 Wend. 201; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *Jackson v. Morse*, 16 Johns. 197; *Overdeer v. Lewis*, 1 W. & S. 90; *Commonwealth v. McNeile*, 8 Phila. 438; *Adams v. Adams*, 7 *id.* 160; *Tribble v. Frame*, 7 J. J. Marsh. 599; *Curl v. Lowell*, 19 Pick. 25; *Miner v. Stevens*, 1 Cush. 482, 485; *Meader v. Stone*, 7 Met. 147; *Curtis v. Galvin*, 1 Allen, 215; *Mason v. Holt*, *id.* 46; *Moore v. Mason*, *id.* 407; *Mugford v. Richardson*, 6 *id.* 76; *Pratt v. Farrar*, 10 *id.* 519, 521; *Sterling v. Warden*, 51 N. H. 217; *Stearns v. Sampson*, 59 Me. 568; *Livingston v. Tanner*, 14 N. Y. 64; *Walton v. File*, 1 Dev. & B. 567; *Johnson v. Hannahan*, 1 Strobh. 313; *Todd v. Jackson*, 26 N. J. 525. In *Rich v. Keyser*, 54 Pa. St. 86, it is said the lessor may expel if there is no breach of the peace. But this was a *dictum* merely, and cannot control the express decisions in the same State above cited. The lessor is, of course, liable for excessive force. *Sampson v. Henry*, 13 Pick. 36; *Commonwealth v. Haley*, 4 Allen, 318. In *Low v. Elwell*, 121 Mass. 309, after an elaborate review of the authorities, the doctrine of the text is fully confirmed; and see *Stone v. Lahey*, 133 *id.* 426, where the principle was affirmed as against one left in possession by the abandoning tenant.

² *Dustin v. Cowdrey*, 23 Vt. 631; and see *Moore v. Boyd*, 24 Me. 242, and *Noel v. McCrory*, 7 Coldw. 623. In *Paige v. DePuy*, 40 Ill. 506, 510; *Reeder v. Purdy*, 41 *id.* 279; *Doty v. Burdick*, 83 *id.* 473, the court, considering the authorities to conflict, adopt the rule in *Dustin v. Cowdrey*, *supra*. In this case, which was elaborately considered, the court proceed

obtained acceptance more from its apparently securing a resort to legal measures instead of to physical force than because it was in consonance with well-established principles or sound authority;¹ and how far the return of the English law to its former basis, and the repudiation of the cases on which this doctrine rested, will control the decisions of the American courts which maintained it, remains to be seen.² It is well settled, however, that a right to re-enter forcibly,

upon two grounds: first, that, as was suggested in *Newton v. Harland*, a forcible entry, being criminal under the statutes, could not invest the lessor with a lawful possession; and, secondly, that restitution being also directed by these statutes, the lessor had acquired no title to possession. But the first consideration is fully controverted by the authorities above cited; and seems to have arisen from confounding the distinction between a *malum prohibitum* and a *malum in se*; and the second seems founded on the mistaken view that an action of trespass would lie because restitution was enforceable, whereas this was only by a proceeding for forcible entry, and after a conviction which no tribunal could anticipate, and impugn the lessor's title. How, moreover, one wrongfully holding possession could maintain an action as if lawfully possessed, the court do not explain. It is noticeable, also, that a very different doctrine was laid down by the same court in *Beecher v. Parmelee*, 9 Vt. 352: "It was formerly considered that the proprietor of land who found an intruder in quiet possession of the same must resort to his legal remedy, and could not forcibly expel such wrong-doer. But it is now well settled that such intruder may be forcibly expelled, so far as the land is concerned. If the owner is guilty of a breach of the peace and trespass on the person of the intruder, in so doing he is liable for that, but his possession is lawful." And in a later case, *Mussey v. Scott*, 32 Vt. 82, the court admit that a violent entry may be made by the landlord, at least where the possession is vacant. See 4 Am. Law Rev. 429, for a review of these cases. In Missouri, the true distinction is drawn, and restitution is enforceable under the statutes of forcible entry, &c., but no action lies by the tenant. *Krevet v. Meyer*, 24 Mo. 107; *Fuhr v. Dean*, 26 id. 116.

¹ 4 Kent, Com. 116.

² A modified form of the same rule prevails to some extent, that, while a forcible entry is actionable as well as indictable if the lessee is present, the lessor may enter with force in the lessee's absence, and, being in, may use all reasonable means to remove the tenant's goods or defend the possession. *Mussey v. Scott*, 32 Vt. 82; *Hilbourn v. Fogg*, 99 Mass. 11; *Clark v. Keliher*, 107 id. 406; but see *Brock v. Berry*, 31 Me. 293, 296; *Larkin v. Avery*, 23 Conn. 304, *contra*. If undue force is used, the lessor is said to become a trespasser *ab initio*. *Whitney v. Swett*, 2 Fost. 10. But see *Esty v. Wilmot*, 15 Gray, 168.

and expel the lessee, may be conferred by the lease in express terms.¹

§ 533. Tenant's Right to remove his Effects. — After the tenant has quit possession, or his tenancy has been terminated by the landlord's entry, the tenant has still a right to go upon the land, within a reasonable time, for the purpose of removing his goods and utensils.² But he can then take away such articles of personal property, only, as are detached from the freehold; for such fixtures as the law permits the tenant to remove must be removed before the expiration of the tenancy.³ Yet a tenant at will, when his interest is determined by a demand of possession on the part of the landlord, has no right to continue his possession for even a reasonable time to remove his goods; though it seems he may enter to remove them, if he does not exclude the landlord.⁴ A landlord who leases to a cropper for the year, and is to receive part of the grain as rent, has a lien upon the growing crop; and it cannot be removed by the tenant, or those acting under him, until the rent is provided for.⁵ So also where a tenant agrees to cultivate and bag the hop crop for the year, in payment of rent, the property in the

¹ Feltman *v.* Cartwright, 7 Scott, 695; Fifty Assoc. *v.* Howland, 5 Cush. 214; Paige *v.* DePuy, 40 Ill. 506; Fabri *v.* Bryan, 80 *id.* 182, where also the restriction in the landlord's right to enter with force is ascribed to a statute; and if this right may be exercised when conferred by contract, it cannot be in itself illegal, for no contract can justify the commission of an act which is *malum in se*, and hence is valid to vest possession even when not contracted for, — the liability to indictment not rendering it inoperative civilly, but merely penal criminally.

² 2 Bl. Com. 14; Ellis *v.* Paige, 1 Pick. 43; Moore *v.* Boyd, 24 Me. 242. Where a landlord agreed to allow his tenant a reasonable time after the expiration of the lease to remove his buildings, and the tenant forfeited his lease before the expiration of the term, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee in terminating it, and the lessee can claim no right under it. Whipley *v.* Dewey, 8 Cal. 36. That this privilege is extended to a weekly tenant, see Cornish *v.* Stubbs, L. R. 5 C. P. 334.

³ Fitzherbert *v.* Shaw, 1 H. Bl. 258; Kutter *v.* Smith, 2 Wall. 491; see *post*, § 551.

⁴ Doe *v.* Jones, 10 B. & C. 718.

⁵ Case *v.* Hart, 11 Ohio, 364.

hops is in the landlord, beyond the control of the tenant.¹ Where, in a lease executed by both parties, a covenant was contained that on the lessee's being removed from the demised premises, or dispossessed, he should be paid the value of the buildings and improvements made by him, and that, on such payment being made, he should yield the possession,—an agreement by the lessor will be implied that the lessee may retain possession until such payment is made, notwithstanding the term for which the premises were demised has expired.² In no case, however, has a tenant a lien upon the premises for advances made by him, for the purpose of making permanent improvements thereon, except by virtue of an agreement to that effect.³ Nor can he claim anything from his landlord for voluntarily improving the property, or for using it in a more beneficial manner than the lease required.⁴ It may be observed, also, before leaving this part of our sub-

¹ *Kelley v. Weston*, 20 Me. 232.

² *Van Rensselaer v. Penniman*, 6 Wend. 569; *Flagg v. Dow*, 99 Mass. 18. And where, in a lease of one hundred years, it was agreed that the lessee, his heirs and assigns, might hold the premises, after the expiration of the term, as long as they should think proper, upon the payment of rent, and the lessee made valuable improvements on the strength of this clause,—the lessor was not allowed to determine the lease without compensating the lessee for his improvements. *Lewis v. Effinger*, 30 Pa. St. 381. Where a lease for a term of years contains a covenant on the part of the landlord, that, at the expiration of the term, the tenant shall be paid the appraised value of a dwelling-house to be erected by him on the demised premises, or that a new lease for the same term of years, at an appraised rent (excluding from the appraisement the value of the dwelling-house), shall be granted to him,—the tenant, at the expiration of the term, is entitled to retain the possession until the covenant shall be performed by the landlord or his representatives. The tenant so retaining possession is not, however, discharged from the payment of rent, but is subject to the general rule that a tenant holding over after the expiration of his lease, with the landlord's consent, becomes a tenant from year to year, on the terms of the original lease. The landlord is equally bound by the same rule, and can recover no more than the original rent reserved. He is not entitled to an increased rent proportioned to the increased value of the premises. *Per Duer, J., Holsman v. Abrams*, 2 Duer, 435.

³ *Taylor v. Baldwin*, 10 Barb. 582.

⁴ *Bullitt v. Musgrave*, 3 Gill, 31. And evidence thereof is not admissible to diminish or mitigate a claim for damages for waste committed by him.

ject, that on the expiration of a lease, whether by forfeiture, lapse of time, or otherwise, the lessor is not entitled to have the indenture of lease returned to him by the lessee who has executed a counterpart, but each party may continue to hold his part of the lease.¹

SECTION III.

TENANT'S RIGHT TO EMBLEMENTS.

§ 534. **Right defined.** — **To what things it extends.** — A tenant for life, or his legal representatives and under-tenants, as well as a tenant from year to year or at will, is entitled to *emblemments*; which means a right to take and carry away, within a reasonable time after his tenancy has ended, such annual productions of the soil as are raised by his labor,—as corn, hops, flax, roots, and the like.² But this right does not extend to such things as are not of annual growth, and do not require the labor of the tenant to produce them, but are the permanent and natural product of the earth, such as trees, fruit, grass, &c.³ Nor does it extend to a crop which does not ordinarily repay the labor by which it is produced within the year in which that labor is bestowed; and has, therefore, been held not to include a second crop of clover, although the first crop, taken at the end of the term, did not repay the expense of cultivation.⁴ This privilege is allowed to tenants for life, at will, or from year to year, and even to tenants for years whose estate may be terminated by some uncertain event, because of the uncertain nature of their

¹ Hall *v.* Ball, 3 Scott, N. R. 577.

² Bevans *v.* Briscoe, 4 Har. & J. 139; Graves *v.* Weld, 5 B. & Ad. 118; Clark *v.* Harvey, 54 Pa. St. 142; Reiff *v.* Reiff, 64 *id.* 134. See Saunders *v.* Ellington, 77 N. C. 255. Grain sown one year and harvested the next is the issues and profits of the year in which it is harvested: Lambert *v.* Stouffer, 55 *id.* 284; and the rent of the cropper being a portion of the crop, falls due, and is payable only when the crop is harvested: *id.*

³ Evans *v.* Iglehart, 6 Gill. & J. 171; Knevitt *v.* Pool, Cro. El. 463; Co. Lit. 55, b; Latham *v.* Atwood, Cro. Car. 515; Reiff *v.* Reiff, *supra*.

⁴ Graves *v.* Weld, *supra*; Whitmarsh *v.* Cutting, 10 Johns. 360.

estates, and lest they should be deterred from the proper cultivation of their lands.¹ And the general rule upon this subject is, that if the term is so uncertain that the tenant at the time he sows his crop cannot know that his tenancy will continue until he shall have reaped it, he will be entitled to the crop as emblements; but if his term is certain, and does not depend upon a contingency, so that at the time he sows the crop he may know that his term will not continue until he shall have reaped it, he will not be entitled to gather it.² He may, however, sometimes claim it as an off-going crop, or the value of it, by express stipulation with his landlord, or by the custom of the country if such custom exists.³

§ 535. In what Cases Right Attaches.— This privilege is extended to all cases where a tenancy has been unexpectedly terminated without the tenant's fault; or, in legal phraseology, has been put an end to *by act of God or the law*. Thus, if a tenant for life dies before harvest-time, and his estate comes to an end, it is ended by an act of God, and his executors will be entitled to the crop;⁴ or if a lease be made to a husband and wife so long as they continue husband and wife, and they shall afterwards be divorced, the tenancy being dissolved by an act of the law, the husband may enter upon the land, and exercise this privilege.⁵ The rule holds also where

¹ *Davis v. Brocklebank*, 9 N. H. 73; *Davis v. Thompson*, 13 Me. 209; *Clark v. Rannie*, 6 Lans. 210; *Kingsbury v. Collins*, 4 Bing. 207.

² *Kingsbury v. Collins*, 4 Bing. 202; *Bain v. Clark*, 10 Johns. 424; *Miller v. Cheney*, 88 Ind. 466; and see *Thomas v. Noel*, 81 *id.* 382; *Hendrixson v. Cardwell*, 9 Baxt. 389; Co. Lit. 50, a. The rule was enforced where the tenancy was for a year with privilege of renewal, and the privilege was destroyed by the sale of the leased property. *Dircks v. Brandt*, 56 Md. 500.

³ A tenant for a term of years is, by custom in New Jersey, entitled to return for the away-going crops, but not for spring crops, as oats, where the tenancy expires at the usual termination of the agricultural year, unless sown by the consent of the landlord. *Howell v. Schenck*, 4 Zab. 89.

⁴ Or his lessee. *Dorsett v. Gray*, 98 Ind. 273.

⁵ *Oland's Case*, 5 Co. 116, a. If a person in possession of land under a judgment in a writ of entry, sow the land pending a writ of right against him, in which judgment is recovered against him, and seisin is

a tenancy is terminated by the act of the landlord, or by a notice to quit proceeding from him.¹ But it is entirely different where the tenancy is put an end to by the act of the tenant himself; for in such case he has no right to take away any of the productions of the land after his tenancy ends.² This is also the case, if he is guilty of a breach of any condition in his lease which forfeits the estate; or, where he holds for a certain term, subject to be defeated upon a particular event, and such event is brought about by an act of the tenant,—as, if land be leased to a widow for twenty years, provided she shall remain a widow so long, and she marries, and so terminates the tenancy by her own act.³ But if a woman

obtained before a severance of the crop, the defendant in the writ of right is entitled to it. So, also, if the land was sown by the grantee of the party recovering in the writ of entry, when the recovery in the writ of right is against such grantee. *King v. Fowler*, 14 Pick. 238.

¹ *Oland v. Burdwick*, Cro. El. 460. In the lease of a farm for six years, it was agreed that either party might terminate the lease by giving six months' notice to the other; but if the lessor gave the notice, he was to allow the lessee a compensation for preparing the ground for seed, &c.; it was held that if the lessor gave the notice after the seed had been put into the ground, the lessee was entitled to the emblements. *Stewart v. Doughty*, 9 Johns. 108. On a similar principle, a vendee in possession under an oral contract to purchase was held entitled to crops which he had sown under an express agreement with the owner, and as licensee; whether also as tenant at will the court were divided. *Harris v. Frink*, 49 N. Y. 24, reversing s. c. 2 Lans. 35. [In note 1, page 22, the decision in the lower court is incorrectly given as that made by the Court of Appeals.]

² *Debow v. Colfax*, 5 Halst. 128; *Bulwer v. Bulwer*, 2 B. & A. 470; *Talbot v. Hill*, 68 Ill. 106. So, where the tenant abandons possession and leaves the immature crop, the landlord may enter and appropriate it without resort to legal process. *Sharp v. Kinsman*, 18 S. C. 108. And where his rent is secured by a statute lien the tenant's mortgagee will be liable on an accounting with the landlord for the expense of gathering the crop. *Fry v. Ford*, 38 Ark. 246. But a landlord who enters upon the demised premises, and harvests and sells a crop of wheat sown by the tenant, acquires no title thereto, unless he can establish a forfeiture of the lease. And this the law will not imply from slight circumstances; there must be notice that the tenancy has ended, a demand of possession, and notice to quit. *Cheney v. Bonnall*, 58 Ill. 268.

³ *Wicks v. Jordan*, 2 Bulst. 213; *Oland's Case, supra*; *Davis v. Eyton*, 7 Bing. 154; *Bulwer v. Bulwer, supra*; *Hunter v. Jones*, 7 Phila. 233.

holding *durante viduitate* leases her estate to an under-tenant, who sows land, and she afterwards marries, her act will not deprive him of emblements.¹

§ 536. Does not Attach to a Defined Tenancy for Years.— But this right never exists where the tenancy is for years, and is to be terminated at the expiration of a certain period; for if, in such case, the tenant, with his eyes open, sows corn which he knows cannot become ripe until after the expiration of his lease, the law will afford him no relief.² But although no indulgence is given in such cases to tenants themselves, it has been extended to under-tenants who have not participated in destroying the estate.³ Where, therefore, a tenant for years, whose lease depended on a certain condition, underlet the land, and his under-lessee sowed corn, and afterwards the first tenant broke the condition, and so forfeited the lease, by means of which they were all ousted,—the under-tenant was, nevertheless, allowed to enter and cut the corn when it was ripe.⁴ Gardeners and nurserymen, also, for the benefit of trade, may, after the expiration of the lease, remove trees, shrubs, &c., planted by them with an express view to sale.⁵

See *Dayton v. Vandoozer*, 39 Mich. 749. So where the tenant is in under one who holds by adverse possession, he cannot enter to remove crops after a judgment of possession against his lessor. *Rowell v. Klein*, 44 Ind. 290. He is supposed to take the risk of the defective title. *Sampson v. Rose*, 65 N. Y. 411.

¹ *Debow v. Colfax*, 5 Halst. 128.

² *Co. Lit.* 55; *Davies v. Connop*, 1 Price, 53; *Bain v. Clark*, *supra*; *Whitmarsh v. Cutting*, *supra*; *Mason v. Myers*, 2 Rob. (N. Y.) 606; *Sanders v. Ellison*, 77 N. C. 255. But where the lease, though for a term of years, is silent as to who shall have the crop, and the rent is equal for each year, and the tenant's right to sow during the last autumn of the term is recognized in the lease, he is entitled to the crop. *Kelly v. Todd*, 1 West Va. 197.

³ *Doe v. Witherwick*, 3 Bing. 11; *Bevans v. Briscoe*, 4 Har. & J. 139.

⁴ *Oland v. Burdwick*, Cro. El. 460; *Bevans v. Briscoe*, *supra*. Upon the same principle, a lessee is entitled to emblements, as against the purchaser of lands sold under a decree of foreclosure: *Cassilly v. Rhodes*, 12 Ohio, 88; or upon a judgment at law: *Biggs v. Brown*, 2 S. & R. 14; *Adams v. M'Kesson*, 53 Pa. St. 81; *Albin v. Riegel*, 40 Ohio St. 339.

⁵ *Penton v. Robart*, 2 East, 90; *Lee v. Risdon*, 7 Taunt. 191; *Brooks v. Galster*, 51 Barb. 196. Emblements may be claimed in hemp, flax,

Generally, where a tenant sows the land and dies, his executors shall have the emblements; but there is an exception to this rule, for if he sows the land and dies, though the property of the corn is in the executors, it is subject to this condition, that if the heir assigns the land sown to the widow for her dower, she shall have the corn; for she shall be in, says Lord Coke, *de optimâ possessione viri*, above the title of executor.¹

§ 537. In Tenancies at Will.—Of Mortgagees.—The common law, however, made a distinction between the right to emblements, and the expense of ploughing and manuring the ground. The determination by the landlord of an estate at will gives the lessee his emblements, provided the lease is determined after the crop is actually in the ground. But if the ouster occurs before the seed is sown, the tenant is not entitled to the crop, nor to compensation for ploughing and manuring the land.² And if the tenant during his occupation, by his labor annexes to the farm part of the waste land formerly unsubdued, it will enure to the benefit of the landlord, without any compensation to the tenant.³ A mortgagee, also, as against the mortgagor and his grantees, has the paramount right; and, therefore, a lessee of the mortgagor, under a lease executed subsequent to the mortgage, is not entitled, as against the mortgagee, to crops growing on the mortgaged premises at the time of the foreclosure and sale of the prem-

saffron, and the like; in melons and potatoes, as well as in grain; and in hops, although they spring from old roots, because they are annually manured and require cultivation. *Latham v. Atwood*, Cro. Car. 515; *Evans v. Roberts*, 5 B. & C. 832. And includes the straw which supports the grain. *Craig v. Dale*, 1 W. & S. 509. Growing grass, however, even if grown from seed, cannot be taken; for although it may be increased by cultivation, it cannot be sufficiently distinguished from the mere natural product of the soil. *Co. Lit.* 56, a; 1 *Roll. Abr.* 728. But it seems to be otherwise with respect to artificial grasses, such as clover and the like. *4 Burn's Eccl. Law*, 410.

¹ 2 Inst. 81.

² *Stewart v. Doughty*, *supra*; 4 *Kent, Com.* 108; *Putnam v. Richie*, 6 *Paige*, 390-403. It is said that the right to emblements does not attach until the seed is sown; preparing the land for the reception of the seed does not confer it. *Price v. Pickett*, 21 *Ala.* 741.

³ *Doe v. Murrell*, 8 *C. & P.* 134.

ises; and the mortgagee, becoming the purchaser, may maintain trespass against the lessee for taking and carrying away the crops.¹

§ 538. Custom in favor of Tenants for Years. — The reason of the rule which allows the usual emblements to a tenant for life, or at will, very properly excludes a tenant for years from the exercise of this privilege; he must suffer the consequences of his own folly, if, with a full knowledge of the period when he will be obliged to quit, he sows what he knows he cannot reap. But by the custom of the country in particular districts, he will be allowed to re-enter, and cut the corn which he has sown after his lease has run out.² Every demise, in respect to matters of which the parties are silent, is open to explanation by the general usage and custom of the country or district where the land lies; and every person, says Mr. Justice Story, under such circumstances, is supposed to be cognizant of the custom, and to contract with reference to it.³ Upon this principle, a tenant for years in Pennsylvania, according to the custom of that State, is entitled to the away-going crop; that is, to grain sown in the autumn before the expiration of the lease, and coming to maturity in the summer after the lease is determined.⁴ The same custom was said,

¹ *Lane v. King*, 8 Wend. 584; *Howell v. Schenck*, 4 Zab. 89. Otherwise as to a tenant on shares with the assent of the mortgagee. *Congdon v. Sanford, Lalor*, 196; *Armstrong v. Bicknell*, 2 Lans. 216; and see *Mayo v. Fletcher*, 14 Pick. 530.

² *Wigglesworth v. Dallison*, Doug. 201; *Boraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing. 465; *Stoddard v. Waters*, 30 Ark. 156.

³ *Van Ness v. Packard*, 2 Pet. 138.

⁴ *Demi v. Bossler*, 1 Penn. 224; *Stultz v. Dickey*, 5 Binn. 285; *Iddings v. Nagle*, 2 W. & S. 22; *Briggs v. Brown*, 2 S. & R. 14; *Shaw v. Bowman*, 91 Pa. St. 414. In the first case, Judge Huston says, the tenant has a right to enter and remove what is called the away-going crop, which heretofore has been held to be grain sown in the autumn to be reaped the next harvest; and no difference has yet been established between a tenant who pays a rent in money, and one who pays a share of the produce of the farm. It is understood a tenant for a year is to take one crop of each kind of grain cultivated, and that he is to mow as many crops of grass as the meadows will produce. This right need not be reserved in the lease; and, after the expiration of the term, the tenant may enter to

by Chief Justice Kirkpatrick, to be well established in New Jersey.¹ And in Delaware it exists as to wheat, but not as to oats.² For a similar reason, in an action by a tenant against his landlord for compensation for seed and labor, under the denomination of *tenant-right*, it has been held that, although there was a written contract between them, the custom of the country would still be binding, if it is not inconsistent with the terms of the contract; for that not only all common-law obligations, but those imposed by custom, were in full force where the contract did not vary them.³

§ 539. Custom not to control Written Instrument. — But evidence of usage, though admissible to add to or explain, is never permitted to vary or contradict, either expressly or by implication, the terms of a written instrument. And, therefore, where a tenant covenanted, on quitting the land, not to sell or take away the manure, but to leave it to be expended by the succeeding tenant, it was held to exclude the custom of the country, by which the outgoing tenant was bound to leave the manure, and was entitled to be paid for it.⁴ It was contended, says Lord Lyndhurst, delivering the

gather the crop, or may maintain trespass against the lessor or his vendee if he cuts it.

¹ *Van Doren v. Everitt*, 2 South. 460. So in Ohio. *Foster v. Robinson*, 6 Ohio St. 90.

² *Templeman v. Biddle*, 1 Harringt. 522. Unless upon a special custom, which must be specially pleaded if relied on. *Id.* In New Jersey, it is said this custom does not apply to a spring crop of oats, sown without consent of the landlord in March, when the term expires in April. *Howell v. Schenck*, 24 N. J. 89. Agricultural leases in the States mentioned in the text generally begin in the spring, either in the end of March or the beginning of April; and the tenant whose lease expires in the spring may sow grain the autumn previous, to be cut the harvest after his tenancy expires; but if he puts in spring crop, oats, for instance, before he leaves, he is not entitled to reap it, but loses it, unless by express contract.

³ *Senior v. Armytage*, Holt, 197. See also *Webb v. Plummer*, 2 B. & A. 750; *Hutton v. Warren*, 1 M. & W. 466; *Magee v. Atkinson*, 2 *id.* 442; *Blackett v. Royal Ex. Co.*, 2 Tyrw. 266.

⁴ *Roberts v. Barker*, 1 Cr. & M. 808; *Reading v. Menham*, 1 Mood. & R. 236.

judgment of the court in this case, that the stipulation to leave the manure was consistent with the tenant's not being paid for what was left, and that the custom to pay for the manure might be ingrafted on the engagement to leave it. But if the parties meant to be governed by the custom in this respect, there was no necessity for any stipulation, as by the custom the tenant would be bound to leave the manure, and would be entitled to be paid for it. It was altogether idle, therefore, to provide for one part of that which was sufficiently provided for by the custom, unless it was intended to exclude the other part.

§ 540. Custom a part of the Contract when not repugnant. — The general rule on this subject is, that, where there has been a contract about a matter concerning which there is an established custom, the custom is reasonably to be understood as forming part of the contract, and may be referred to, to show the intention of the parties, in those particulars which are not expressed in the contract.¹ But if the meaning of the contract is certain and beyond doubt, usage cannot be admitted to vary or contradict it.² The usage, however, to be admis-

¹ *Hinton v. Locke*, 5 Hill, 437; *Wadsworth v. Allcott*, 6 N. Y. 64; *Sewall v. Gibbs*, 1 Hall, 602; *Connor v. Robinson*, 2 Hill (S. C.), 354; *Wilcox v. Wood*, 9 Wend. 349. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage or custom of the country, or of the district where the land lies. *Per Story, J.*, in *Van Ness v. Packard*; 2 Pet. 148; *Thomas v. Davis*, 76 Mo. 72. Evidence of usage is allowed to annex incidents to written contracts in matters with respect to which they are silent. *Hutton v. Warren*, 1 M. & W. 476; *Legh v. Hewitt*, 4 East, 154. In *Wigglesworth v. Dallison*, Doug. 201, the tenant was allowed an away-going crop, although there was a formal lease under seal. The custom, says *Lord Mansfield*, does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking, — as, a heriot may be due by custom, although not mentioned in the grant or lease.

² *Macomber v. Parker*, 13 Pick. 175. Evidence of custom will be excluded where the written agreement is expressly or impliedly inconsistent with it. *Roberts v. Barker*, 1 Cr. & M. 808. A usage may be proved by parol evidence, and when proved it may give a peculiar effect and meaning to the words of a contract, necessarily referring to the usage proved.

sible, must be proved to have been known to the parties, or to be so general and well-established, that knowledge and adoption of it may be presumed. Such proof must be by evidence of facts, and not of mere opinions,—by means of witnesses who have had frequent and actual experience of the custom, speaking from particular instances within their own knowledge.¹ The custom must also be certain and uniform.² And the rule must be stated with the further qualification that usage is never admissible to oppose or alter a general principle or rule of law, and upon a fixed state of facts to make the legal rights and liabilities of the parties other than they are by the common law.³ But in order to constitute such a custom, or, more properly speaking, such a usage, as is binding upon a tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage, applicable to farms of a similar description.⁴

Per Sewall, J., in *Murray v. Hatch*, 6 Mass. 477. The usage of no class of citizens can be sustained in opposition to principles of law. *Homer v. Dorr*, 10 Mass. 29.

¹ *Mills v. Hallock*, 2 Edw. 652. The true test of a usage is its having existed a sufficient length of time to have it become generally known, and to warrant a presumption that contracts are made in reference to it. *Per curiam*, in *Smith v. Wright*, 1 Caines, 43.

² *Stevens v. Reeves*, 9 Pick. 198; *Collins v. Hope*, 3 Wash. C. C. 149; *Chastain v. Bowman*, 1 Hill (S. C.), 270; *Wood v. Hickock*, 2 Wend. 501; *Dawson v. Kittle*, 4 Hill, 107. To be uniform, it must have been constantly observed in the same manner. *Wood v. Wood*, 1 C. & P. 59; *Martin v. Del. Ins. Co.*, 2 Wash. C. C. 254; *Rapp v. Palmer*, 3 Watts, 178. And a local usage cannot vary the construction of a contract, unless it is proved that its existence was known to the parties, and that their contract was made in reference to its terms. *Wheeler v. Newbould*, 5 Duer, 29; affirmed, 16 N. Y. 392.

³ *Frith v. Barker*, 2 Johns. 327; *Cole v. Goodwin*, 19 Wend. 251; *Story v. Bliss*, 6 Met. 393; *Bryant v. Com. Ins. Co.*, 6 Pick. 131; *Henry v. Risk*, 1 Dall. 265; *Stoever v. Whitman*, 6 Binn. 416; *Bartlett v. Pentland*, 10 B. & C. 760.

⁴ *Dalby v. Hirst*, 1 Br. & B. 224; *Webb v. Plummer*, 2 B. & A. 746; *Thorpe v. Eyrie*, 3 Nev. & M. 214. When a custom of the country is proved to exist, it will not be assumed to be confined only to tenancies which are not created by writing, but will be considered as applicable to all tenancies, in whatever way they may be created, unless it is expressly or impliedly excluded by the contract. *Wilkins v. Wood*, 17 L. J. Q. B. 319.

§ 541. **Manure, when to be returned to the Soil.**— If a farm is leased for agricultural purposes, good husbandry, which, without any stipulation therefor, is implied by law, requires that the manure made upon it during the term should be returned to the soil to repair the waste caused by the production of the crops; and that so much of it as has accumulated in the last year of the tenancy should be left by the tenant to his successor, to be used in like manner.¹ And a covenant by lessee not to carry away the hay, manure, &c., will be construed as a reservation thereof to the lessor.² But if the land was not let for such purposes, or only a portion of it was used for herding cattle, or the like, which a lessee might do without injury to the reversion, he may remove any manure which has accumulated by feeding his cattle on the land with provender brought upon the premises from other sources, so far as it is not commingled with the soil, and may be done without injury to the land.³ The practice and usage of the neighboring country, and even that which relates to a particular farm, will however enter into the decision of the question; since the parties are presumed, as we have seen, to enter into the engagement with reference to it, where there is no express stipulation on the subject. And what may be good husbandry in respect to one particular soil, climate, or situation, may not be so in respect to another.⁴ But, independently of the usage and custom of the place, Mr. Justice

¹ *Gallagher v. Shipley*, 24 Md. 418; *Watson v. Welsh*, 1 Esp. 131; *Barrington v. Justice*, 2 Clark, Pa. 501.

² *Heald v. Builders' Ins. Co.*, 111 Mass. 38.

³ *Id.*; *Needham v. Allison*, 24 N. H. 355; *Carey v. Bishop*, 48 Ill. 146. But if the manure is the personal property of the tenant, he does not lose his title thereto by leaving it on the farm when he quits. *Fletcher v. Herring*, 112 Mass. 382. But if the farm, though a dairy farm, is also used for cultivation, the manure belongs to the lessor, and must be used on the premises. *Bonnell v. Allen*, 53 Ind. 130. And if the tenant in removing manure removes the soil beneath it, he is liable in trover. *Higgon v. Mortimer*, 6 C. & P. 616.

⁴ *Willey v. Connor*, 44 Vt. 68. Here, under a five years' lease, expiring July 18, the tenant was allowed to take away the crop of hay maturing a week before, if according to good husbandry, though he had also taken that maturing in the year the lease began.

Buller stated the rule to be, that every tenant, when no particular agreement existed dispensing with the obligation, is bound to cultivate his farm in a husbandly manner, and to consume its products upon it.¹ In conformity to these principles, it has been decided in the State of New York that, where a farm is taken for agricultural purposes, and there is no particular agreement as to the manure that will be made on it during the occupation of the tenant, the manure does not belong to the tenant, but to the farm, and must be used on the farm; and the tenant has no more right to remove it before or after the expiration of his term, or to dispose of it to others, than he has to remove or dispose of any fixture belonging to the farm.² A different rule has been laid down in North Carolina, where it is held that a tenant who is about to remove has a right, if there is no covenant or custom to the contrary, to all the manure made by him on the farm; that it is his personal property, and he may remove it as

¹ *Brown v. Crump*, 1 Marsh, 567; *Legh v. Hewitt*, 4 East, 154; *Wiglesworth v. Dallison*, Doug. 201; *Webb v. Plummer*, 2 B. & A. 746. And a tenant for two years is not entitled to remove the manure merely because the lease provides that he shall bring on as much dressing as he removes hay. *Hill v. De Rochemont*, 48 N. H. 87.

² *Middlebrook v. Corwin*, 15 Wend. 169; *Goodrich v. Jones*, 2 Hill, 142; *Stone v. Proctor*, 2 Chipm. 115; *Perry v. Carr*, 44 N. H. 118; *Lewis v. Jones*, 17 Pa. St. 262. See *Chase v. Wingate*, 68 Me. 204. If the tenant sells or removes manure made in the ordinary course of husbandry, no property is vested in the vendee, and the landlord may have an action *de bonis asportatis* against him. *Daniels v. Pond*, 21 Pick. 367; *Lewis v. Lyman*, 22 id. 437. In this case Ch. J. Shaw says: "Manure made on a farm by a tenant at will or for years, in the ordinary course of husbandry, consisting of the collections from the stable and barnyard, or of composts formed by an admixture of these with the soil or other substances, is by usage, practice, and general understanding, so attached to and connected with the realty that in the absence of any express stipulation on the subject, an outgoing tenant has no right to remove the manure thus collected, or to sell it to be removed, and such removal is a tort for which the landlord may have redress." To the same effect is *Lassell v. Reed*, 6 Greenl. 222; and *Lewis v. Jones*, *supra*. This doctrine is confined to farms let for agricultural purposes; but in *Wain v. O'Connor*, a milk farm was held to be a farm used for agricultural purposes, so far as the right to remove the manure was concerned; but see *Bonnell v. Allen*, 53 Ind. 130.

such; but this case is clearly at variance with all other American decisions on this subject.¹

§ 542. **Mutual Privileges founded on Usage.**—There are sometimes mutual privileges, founded on the common usage of the neighborhood, to which outgoing and incoming tenants are entitled. Thus, in England, the outgoing tenant has the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy, for the purpose of ploughing and sowing the land.² The same reasonable privileges are believed to exist among us,—varying, probably, according to the usages of particular sections of the country, which, as we have just seen, are sufficient to confer such rights, without proof of an immemorial custom. We have observed that an out-going tenant has no claim to the manure remaining on the premises when he leaves them, but the parties may, of course, agree to the contrary; and where the outgone tenant covenanted to leave the manure, to be made by him on the farm, and sell it to the incoming tenant, at a valuation to be made by certain persons, the effect of such a covenant was held to be to give the outgone tenant a right of onstand for his manure upon the farm, the possession and property in it remaining in him in the meantime; and, therefore, if the incoming tenant should remove and use it before such valuation, he is answerable to the outgone tenant in trespass.³

¹ *Smithwick v. Ellison*, 2 Ired. 326. Where a farm is let on shares for cultivation, and wheat is raised thereon by the tenant, the straw is a part of the crop, and belongs to the owners thereof; unless there is some stipulation or custom to the contrary. It does not necessarily belong to the farm, nor is there any general usage requiring it to be used as manure upon the land where it grew. *Fobes v. Shattuck*, 22 Barb. 568. In Pennsylvania, it is said, the away-going crop includes as well the straw as the grain, which the tenant may remove and dispose of as he pleases, being subject only to the terms of his contract, and not to any supposed custom of the country on the subject. *Craig v. Dale*, 1 W. & S. 509; *Iddings v. Nagle*, 2 *id.* 22; *Rank v. Rank*, 5 Pa. St. 211.

² *Boraston v. Green*, 16 East, 71.

³ *Beaty v. Gibbons*, 16 East, 116.

§ 543. **Right lost by Tenant's Acts.—General Right to remove.**—A tenant may also by his own acts lose the right to be paid for improvements, notwithstanding an agreement to that effect may exist in the lease,—as, if he leaves the premises, although with the consent of the landlord, before the expiration of his tenancy, but without any fresh agreement with respect to the improvements.¹ And it must be borne in mind that any agreement between outgoing and incoming tenants, in relation to a sale of crops or manure, cannot prejudice the landlord's rights with respect to them.² But in general, all the hay, straw, grass severed, dead and live stock, and every personal chattel upon the farm at the expiration of the tenancy belongs to the tenant, and may be removed by him, unless there be some custom of the country to the contrary, or an express stipulation with the landlord. If there be both custom and stipulation, the latter will of course supersede the former, and determine the tenant's rights. If, however, there be neither custom nor stipulation to the contrary, the crops which are in the ground, or shall not have been severed before the expiration of the term, will belong strictly to the landlord.³ It only remains to observe that, where a tenant is entitled to emblements, he is also entitled to ingress, egress, and regress for the purpose of reaping and carrying them away; and the same privilege will belong to his vendee or under-tenant; but neither of them will have any exclusive right of occupation.⁴

¹ *Whittaker v. Barker*, 1 Cr. & M. 113.

² *Petrie v. Daniel*, 1 Smith, 199.

³ *Caldecott v. Smythies*, 7 C. & P. 808. Where in a lease of a farm for one year from the 9th of April, it was stipulated that the lessee was privileged to sow not over ten acres of rye, the straw from which, if threshed on the farm, should remain for the benefit of the farm,—it was held that the lessee was entitled to sow ten acres of rye in the fall, and to enter and reap it in the succeeding summer, after the expiration of the lease. *Hudson v. Parker*, 13 Conn. 62.

⁴ The tenant's interest in this respect is not a mere easement, but amounts to a possession, and is a good answer to an action of trespass brought against him for entering to take the crop away. *Beavan v. Delahay*, 1 H. Bl. 5; 1 Inst. 56, a; *Shep. Touch.* 244; *Griffiths v. Puleston*, 13 M. & W. 358. And in Maryland it has been held that where a tenant for life dies in possession, the reversioner or remainder-man is not

SECTION IV.

THE TENANT'S RIGHT TO REMOVE FIXTURES.

§ 544. Fixtures, what.—As between Grantor and Grantee.—Between Landlord and Tenant.—Fixtures are chattels, or articles of a personal nature, which have been affixed to the land in such a manner as to constitute part of the realty to which they adhere, and do therefore partake of its incidents and properties. At common law, it was waste for a tenant to take down or remove anything affixed to the freehold, even although he had originally put it up for his own use; and the principle holds good at the present day, as to all fixtures that belong to the landlord, and were attached to the freehold when the tenant took possession, or which may have been subsequently annexed by the landlord.¹ As a general rule, also, everything fixed to the land, either immediately, as a house, or indirectly as a window or door in the house, was considered as belonging to the proprietor of the entitled to occupy the land on which a crop is growing, until the crop is taken off, or a reasonable time has been given for taking it off. *Beavaas v. Briscoe*, 4 H. & J. 139.

¹ Co. Lit. 53, a. To constitute a fixture, the article must be permanently and habitually attached to the land; or it must be a component part of some erection, structure, or machine attached to the freehold, and without which the erection, structure, or machine would be imperfect and incomplete. *Vanderpoel v. Van Allen*, 10 Barb. 157; *Dubois v. Kelley*, *id.* 496; *Walker v. Sherman*, 20 Wend. 636. Much confusion has been introduced into the law by the different meanings given to the word "fixtures." It has sometimes been applied to all articles attached to realty, distinguished from chattels, and thus windows, keys, doors, &c., have been so called. So to buildings permanently annexed to the land. *Bonney v. Foss*, 62 Me. 248; *Linahan v. Barr*, 41 Conn. 471. But this is an unnecessary and improper use of the term, as these are as essential parts of the realty as the soil itself. Again, fixtures have been distinguished as irremovable and removable. The former class only exists as between grantor and grantees, or heir and executor, and the like. But as regards landlord and tenant, it is only with the latter class we have to deal. In a correct sense, a fixture is understood to comprehend any article which a tenant has the power to remove. Per Parke, B., in *Sheen v. Ritchie*, 5 M. & W. 182.

land; because the things so affixed could not be enjoyed apart from the land to which they were attached. And when placed there by a tenant, they were supposed to have been affixed for the increased value of the land, inasmuch as the tenant could not call upon the owner for compensation; having annexed them for his own purposes, he could not impose a duty on the landlord without his consent.¹ As between a grantor and grantees of the fee, the doctrine of making fixtures part of the freehold has been more strictly applied than between other classes of persons; yet, even here, the general rule now is, that anything of a personal nature, not absolutely affixed to the freehold, is not to be considered as an incident to the land.² But, as between a landlord and his tenant, the rigor of the old law became gradually relaxed, as a more just method of reasoning suggested that a man might have occasion to affix a chattel belonging to himself to the land of another, and yet be unwilling to part with his ownership in such chattel; that it might become necessary, for the comfortable or profitable occupation of a house, that the tenant should put up things temporarily for his own use; and that it would be unjust to consider such articles the absolute property of the owner of the house, when the tenant had manifestly placed them there for his own purposes.³ Courts

¹ Culling *v.* Tuffnell, Bull. N. P. 34.

² Walker *v.* Sherman, *supra*; Kirwan *v.* Latour, 1 H. & J. 289; Coombs *v.* Jordan, 3 Bland, 284. It is held that a mortgagor in a mortgage made subsequent to a lease is in the position of a lessor, and that unless the lessee loses his rights by some act of his own, machinery placed by him on the premises which, as between him and the lessor, would be personal property will be so as between him and the mortgagor, although the machinery is so annexed that, as between vendor and vendee, it would be part of the realty. And although the lessee, under a provision in his lease, purchased and took a conveyance after the execution of the mortgage, it was further held, although the estate for years under the lease was merged in the fee, that the machinery did not become a part of the realty, and was not merged, the ownership of it being independent of the interest under the lease, and not derived from the lessor. Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23.

³ Beck *v.* Rebow, 1 P. Wms. 94; Gaffield *v.* Hapgood, 17 Pick. 195; Hendy *v.* Dinkerhoff, 57 Cal. 3. But the tenant of a mortgagor, by a demise subsequent to the mortgage, is not entitled to fixtures as against

of law subsequently adopted the principle that it is for the benefit of the public to encourage tenants to make improvements in trade, and to do what is advantageous for the estate during the term, with the certainty of their being still benefited by it at the end of the term.¹ And in modern times the rule is understood to be, that upon principles of general policy, a tenant, whether for life, for years, or at will, is permitted to carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises, for the purpose of *ornament, domestic convenience, or to carry on trade*; provided the removal can be effected without material injury to the freehold.²

the mortgagee as a tenant, but only as a mortgagor. *Lynde v. Rowe*, 12 Allen, 100. So one in possession under a bond to convey, but paying no rent, or a vendor who remains as a tenant to the vendee, are subject to the rule as between vendor and vendee. *McLaughlin v. Nash*, 14 Allen, 136; *Weston v. Weston*, 102 Mass. 514. The rule of the common law was, that whatever was annexed to the soil belonged to it, and whenever the question is between the owner of the soil and the owner of the chattel only, this rule controls in the absence of agreement. *Mather v. Fraser*, 2 Kay & J. 536; *Walmsly v. Milne*, 7 C. B. n. s. 115; *Fisher v. Dixon*, 2 Clark & F. 312. But as the tenant has possession of the soil as well as the chattel, his case forms an exception during his term; and chattels annexed, and which as between their owner and the freeholder would have vested in the latter, continue to belong to the tenant conditionally on his removing them before the end of his term.

¹ *Lawton v. Lawton*, 3 Atk. 13; *Wall v. Hinds*, 4 Gray, 270; *King v. Johnson*, 7 id. 241. The law regards with peculiar favor the rights of tenants, as against their landlords, to remove articles annexed by them to the freehold, and extends much greater indulgence to them in this respect than it concedes to executors, remainder-men, or any other class of persons. *Taylor v. Townsend*, 8 Mass. 416; *Whiting v. Brastow*, 4 Pick. 311; *Miller v. Baker*, 1 Met. 31; *Tate v. Blackburne*, 48 Miss. 1.

² *Washburn v. Sproat*, 16 Mass. 449; *Lawrence v. Kemp*, 1 Duer, 363. In *Cubbins v. Ayres*, 4 Lea, 329, a stipulation contained in the lease that the tenant should make no "alterations or repairs" nor remove "any repairs, improvements, additions, or fixtures," was construed as not to apply to trade fixtures. But see *Agnew v. Whitney*, 10 Phila. 77, where a boiler for brewing purposes was held to be "an alteration or improvement" which by the terms of the lease of the brewery were not to be removed by the tenant. The character of an article, and not its mere annexation, determines whether or not it becomes a fixture. *Seeger v. Pettit*, 77 Pa. St. 437. Both tests are to be applied, but the greater weight is given to the former. "Regard is to be had to the object, effect,

§ 545. **Trade Fixtures, what.**—As regards trade fixtures, it may be stated, in general terms, that a tenant may take away whatever he erects for the purpose of carrying on trade, whether it be machinery or buildings, even though affixed to the soil or freehold. This principle was first distinctly recognized in a case where a tenant for years, who was a soap-boiler, for the convenience of his trade put up vats and copper tables upon the demised premises. Chief Justice Holt held they might be removed during the term, not by virtue of any special custom, but by common law, in favor of trade, and to encourage industry.¹ There have been similar adjudications in the case of a baker's oven ;² salt-pans ;³ card-

and mode of annexation.” Per Gray, J., *McLaughlin v. Nash*, 14 Allen, 136. Thus, a hydraulic press in a private house is no fixture, though mortared down, and built on beams, the joists being removed for that purpose. *Parsons v. Hind*, 14 W. R. 860. So mere weight or bulk, though this may replace affixation (*Pyle v. Pennock*, 2 W. & S. 390; *Winslow v. Merchant Ins. Co.*, 4 Met. 306) will not, if the article is not essential to the completeness of the thing demised, make such article a fixture. *Buckley v. Buckley*, 11 Barb. 43; *Harlan v. Harlan*, 15 Pa. St. 507; *Trull v. Fuller*, 28 Me. 545; *Corliss v. McLagin*, 29 *id.* 115. But it seems there must be both annexation (*Walker v. Sherman*, 20 Wend. 636; *Swift v. Thompson*, 9 Conn. 63; *Taffee v. Warnick*, 3 Blackf. 111; *Farrar v. Chauffetete*, 5 Den. 527; *Vanderpoel v. Van Allen*, 10 Barb. 157; *McClintock v. Graham*, 3 McCord, 553) and applicability. *Desp. Line v. Bellamy M. F. Co.*, 12 N. H. 205; *Lathrop v. Blake*, 8 Fost. 46. Thus, in *Weston v. Weston*, 102 Mass. 514, marble mantel slabs were held to be chattels, because not actually affixed, and, though useful, not indispensable. Formerly, manner of annexation was made the test: *Teaff v. Hewitt*, 1 Ohio St. 511; *Seeger v. Pettit*, *supra*; but the chattel even then was held not sufficiently annexed to become a fixture, if its removal would not do material injury to the freehold: *Hellawell v. Eastwood*, 6 Exch. 295. But this seems to carry the rule too far, as the definition of a fixture supposes a feasibility of removal. Per Parke, B., *Sheen v. Ritchie*, 5 M. & W. 182; and see *Kelly v. Border City Mills*, 126 Mass. 148, where as between vendor and vendee boilers in a boiler-house joined to a mill were held to constitute a part of the building.

¹ *Poole's Case*, 1 Salk. 368; *Union Bank v. Emerson*, 15 Mass. 159. The right of a tenant to remove fixtures put in by himself during the time of his possession cannot be doubted. *Beardsley v. Sherman*, 1 Daly, 325; *Hill v. Sewald*, 53 Pa. St. 271.

² *Year Book*, 20 Henry VII. 13, b.

³ *Lawton v. Salmon*, 1 H. Bl. 259, n.; *Pillow v. Love*, 5 Hayw. 109.

ing-machines ;¹ steam-engines and boilers ;² cider-mills and furnaces ;³ ice-houses ;⁴ steam-engines ;⁵ calenders ;⁶ bowling-alleys in a room leased for hall purposes ;⁷ platform-scales ;⁸ manure which is not the produce of agricultural lands but accumulates in livery stables ;⁹ copper stills, &c., erected to carry on the business of a distillery, though fixed to the building ;¹⁰ counters or counting-rooms nailed to the floor ;¹¹ a stone for grinding bark affixed to a bark-mill ;¹² or other heavy machinery, such as a trip-hammer, forge-blower, or the like.¹³ Of the same character are buildings called Dutch barns, standing on a foundation of brickwork let into the ground ;¹⁴ a varnish house, for carrying on a varnish manu-

¹ Taffe *v.* Warnick, 3 Blackf. 111; Merritt *v.* Judd, 14 Cal. 59.

² Hay *v.* Bruner, 61 Pa. St. 87; Hill *v.* Sewald, *supra*; Holbrook *v.* Chamberlin, 116 Mass. 155; Conrad *v.* Saginaw Mining Co., 54 Mich. 249.

³ Holmes *v.* Tremper, 20 Johns. 29; Lawton *v.* Lawton, 3 Atk. 13.

⁴ Antoni *v.* Belknap, 102 Mass. 193; Croomie *v.* Hoover, 40 Ind. 49.

⁵ Cook *v.* Champl. Tr. Co., 1 Den. 92; Swift *v.* Thompson, 9 Conn. 63; Dudley *v.* Dudley, cited by Lord Kenyon, 4 Esp. 34; Day *v.* Perkins, 2 Sandf. Ch. 359.

⁶ Talbot *v.* Whipple, 14 Allen, 177.

⁷ Hanrahan *v.* O'Reilly, 102 Mass. 201.

⁸ Bliss *v.* Whitney, 9 Allen, 114.

⁹ Carroll *v.* Newton, 17 How. Pr. R. 189.

¹⁰ Reynolds *v.* Shuler, 5 Cow. 323; Raymond *v.* White, 7 *id.* 319.

¹¹ Guthrie *v.* Jones, 108 Mass. 191; Brown *v.* Wallis, 115 *id.* 56. So large cases containing drawers and shelves, attached by nails to the wall, and for the reception of which the wall had been fitted by omitting to place a base-board in the space behind the cases. Kimball *v.* Grand Lodge of Masons, 131 Mass. 59.

¹² Heermance *v.* Vernoy, 6 Johns. 5; Taylor *v.* Townsend, 8 Mass. 416. Gas-fixtures, mirrors, cases of drawers, and sitting-stools, placed by a tenant in a shop, though fastened to the building, are not fixtures, as between the landlord and tenant, but they are the property of the tenant, and may be removed by him, after as well as during the term. Lawrence *v.* Kemp, 1 Duer, 363. So Guthrie *v.* Jones, *supra*; though in Wall *v.* Hinds, 4 Gray, 270, Elliott *v.* Bishop, 10 Exch. 512, gas-fixtures were regarded as removable fixtures.

¹³ McLaughlin *v.* Nash, *supra*; Heffner *v.* Lewis, 73 Pa. St. 302. Or a spinning-mule, Furbush *v.* Chappell, 105 *id.* 187. But a portable boiler or an anvil is a chattel personal. McLaughlin *v.* Nash, Holbrook *v.* Chamberlain, *supra*.

¹⁴ Dean *v.* Allalley, 3 Esp. 11; Wells *v.* Banister, 4 Mass. 514.

factory, built on a brick foundation with a chimney;¹ or a ball-room, erected by the lessee of an inn, resting upon stone posts imbedded in the soil, and which are removable without injury to the inheritance.²

§ 546. **Things required for Purposes of Trade, are.**—This doctrine was fully considered in the Supreme Court of the United States, where Mr. Justice Story held that the question whether a given article is capable of removal *does not depend upon the form or size of the building*, whether it has a brick foundation, is one or more stories high, or has a chimney; but that *the only question is whether it was designed for the purposes of trade*; that a tenant may erect a large as well as a small messuage, or a soap-boillery of one or two stories high, and on such foundations as he chooses; and was not liable in that case for waste in pulling down and removing a wooden dwelling-house, with a stone cellar and brick chimney, which he erected upon a lot of land he had rented for a term of years, for the purpose of carrying on the business of a dairyman, and for the residence of his family and servants engaged

¹ *Penton v. Robart*, 2 East, 88; *Rex v. Otley*, 1 B. & Ad. 161; *Kelley v. Austin*, 46 Ill. 181. So a dye-house, seventy-five feet long, thirty-five high, and thirty wide, and bolted into the ground. *Talbot v. Whipple*, 14 Allen, 177.

² *Ombony v. Jones*, 19 N. Y. 234; *Livingston v. Sulzer*, 19 Hun, 375. In *Conrad v. Saginaw Mining Co.*, 54 Mich. 249, it was held that dwellings erected by the tenant in a mining-lease for the miners to live in, and standing on posts or dry stone walls piled together, such houses being intended to be merely accessory to the mining operations under the lease, and there being no intention so to affix them to the realty as to make them accessory to the soil, and they being capable of removal without material disturbance to the land, were trade fixtures and might be removed at or before the end of the term. In *Ombony v. Jones*, *supra*, the court held that the distinction between trade fixtures and fixtures in agricultural leases was long established, but highly technical, and that the true rule upon all the cases was that any tenant may remove all erections made by him that can be removed without injury to the land, or something permanently attached thereto. Where the foundation upon which a building rests is imbedded in the earth, he cannot remove the foundation; but when the building rests upon such foundation, and is confined by its weight only, he may remove the building.

in the business.¹ And where a tenant for years took down and removed an old shop standing on the leased premises, and erected a new one on its foundation for the same purposes, the use of a portion of the materials of the old shop in the construction of the new one by such tenant was held not to vest the title to the latter in the owner of the former, if the new shop was a different and distinct building from the old shop, and not the old one repaired or reconstructed, — the title to the new shop in such case turning on the question whether it was substantially and essentially the same building as the old one.² The principle has been held to extend to gardeners and nursery-men, who are considered tradesmen, and may take away their greenhouses and hothouses, with all trees, shrubbery, &c., planted for the purpose of sale.³ But a person who occupies land as a farmer, and is not a professed nursery-man or gardener, cannot carry away young fruit-trees raised on the demised premises, for the purpose of planting them in his own gardens or orchards.⁴

§ 547. **Domestic Fixtures, what.** — Domestic fixtures are all such articles as a tenant attaches to a dwelling-house in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury, — such as furnaces, stoves, cupboards, and shelves, bells, bell-pulls, gas-fixtures, &c.;⁵ or things merely *ornamental*, —

¹ *Van Ness v. Packard*, 2 Pet. 137; *Pemberton v. King*, 2 Dev. 376; *Fairis v. Walker*, 1 Bailey, 540; *Godard v. Gould*, 14 Barb. 662; *Antoni v. Belknap*, 102 Mass. 193; *Conrad v. Saginaw Mining Co.*, 54 Mich. 249.

² *Beers v. St. John*, 16 Conn. 322. What circumstances determine whether the chattel is so annexed as to be a fixture are stated *ante*, § 544, and note.

³ *King v. Wilcomb*, 7 Barb. 263; *Penton v. Robart*, 2 East, 90; *Lee v. Risdon*, 7 Taunt. 191; *Miller v. Baker*, 1 Met. 27; but see *Hamilton v. Austin*, 36 Hun, 138, where was held that trees grown in nursery-grounds were not fixtures, but part of the realty.

⁴ *Wyndham v. Way*, 4 Taunt. 316; *Miller v. Baker*, 1 Met. 27.

⁵ *Rex v. St. Dunstan*, 4 B. & C. 686; *Lee v. Risdon*, *supra*; *Winn v. Ingleby*, 5 B. & A. 625; *Rex v. Londonthorpe*, 6 T. R. 379; *Grymes v. Boweren*, 6 Bing. 437; *Lawrence v. Kemp*, 1 Duer, 363; *Wall v. Hinds*, 4 Gray, 270; *Huntly v. Russell*, 13 Q. B. 572; *Rex v. Otley*, 1 B. & Ad. 161; *Wansbrough v. Maton*, 4 Ad. & E. 884. In *Martin v. Roe*, 7 Ellis

as painted wainscots, pier and chimney glasses, although attached to the walls with screws, marble chimney-pieces, grates, beds nailed to the walls, window-blinds, and curtains.¹ All these articles, whether useful or ornamental, are in a manner necessary to the tenant's domestic comfort; and being easily severed from the house, are capable of being equally useful to him in any other house he may occupy, and therefore he may remove them. But things which he attaches to the house in a more permanent manner, in order to complete it, such as hearthstones,² doors,³ and windows, closets, presses, locks, and keys,⁴ he cannot take away, because such things are peculiarly adapted to the house in which they are fixed, and, if taken away, are injurious to the freehold.⁵ All substantial additions made to the house, also, become part of the freehold, and are immovable; such as conservatories, greenhouses, hothouses, pigsties, stables, wash-houses, and other out-houses;⁶ neither

& B. 237, hot-houses of glass and framework seventy feet long and twenty high, and resting on brick walls, but not fastened to nor connected with the dwelling-house, were held removable at any time; so of a pump placed in a well by the tenant: *McCracken v. Hall*, 7 Ind. 30; or a fire-grate set in a common fire-place: *Gaffield v. Hapgood*, 17 Pick. 192; a cistern and sink set in the floor of a hotel or boarding-house: *Wall v. Hinds, supra*; a hydraulic press let into the ground: *Finney v. Watkins*, 13 Mo. 291; and see *Parsons v. Hind*, 14 W. R. 860; *Wood v. Hewitt*, 8 Q. B. 913. It is not, however, safe to depend on any classification or enumeration. Many such things are, perhaps, more properly chattels than fixtures. The constant changes in the mode of occupying and furnishing houses tend to transfer many things from one class to another,—especially from that of fixtures to that of chattels personal. Thus gas-fixtures, &c., *ante*, § 545, and note.

¹ *Beck v. Rebow*, 1 P. Wms. 94; *Lawton v. Lawton, supra*.

² *Poole's Case*, 1 Salk. 368, cited in *Elwes v. Mawe*, 3 East, 38. And this is now the law in England by statute 14 & 15 Vict. c. 25, § 3.

³ *Kinlyside v. Thornton*, 2 W. Bl. 1111.

⁴ *St. John v. Piggott*, 2 Bulst. 102; *Liford's Case*, 11 Co. 50.

⁵ *Pyot v. St. John*, Cro. Jac. 329; *Kinlyside v. Thornton, supra*; *Kimpton v. Eve*, 2 Ves. & B. 349.

⁶ *Buckland v. Butterfield*, 2 Brod. & B. 54; *Penry v. Brown*, 2 Stark. 403. A lessee who voluntarily, and without contract, express or implied, erects buildings or fixtures, as contradistinguished from chattels, on leased premises, is not entitled to remove them, nor to receive compensation therefor. *Gray v. Oyler*, 2 Ky. 256.

can the tenant remove shrubbery or flowers planted by him in the garden.¹

§ 548. Erections for Agricultural Purposes.—Differing Rules as to. — This privilege, however, has not usually been extended to the case of buildings, out-houses, &c., which have been erected for agricultural purposes ; though it is difficult to perceive why such fixtures should stand upon a less favorable footing than trade fixtures, when the relative importance of the two arts to the community is considered. The industry of the farmer will, of course, be more productive, in proportion to the improved condition of his buildings, and his advantages for rearing stock and storing produce ; and it seems but a narrow policy which refuses to the agricultural tenant the same protection that is extended to the improvements of the manufacturer. The doctrine was strongly laid down by Lord Ellenborough, in an English case, where the tenant of a farm under a lease for twenty-one years, erected at his own expense a variety of substantial buildings for agricultural purposes, with foundations a foot and a half in the ground ; and previous to the expiration of his lease, pulled down the erections, dug up the foundations, and carried away the materials, leaving the premises in the same state as when he entered upon them ; the court being of opinion, that to permit him to do so, would be an innovation upon the uniform current of legal authorities on the subject.² But in the case

¹ *Empson v. Soden*, 4 B. & Ad. 655; *Penton v. Robart*, 2 East, 91. As to strawberry-beds, see *Wetherell v. Howells*, 1 Camp. 227. Rails built into a fence by a tenant, under an agreement with the landlord, are the personal property of the tenant. *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 *id.* 344.

² *Elwes v. Mawe*, 3 East, 38. In England, the relative rights of landlord and tenant with respect to farm buildings or machinery erected by tenants for agricultural purposes, or for purposes of trade, have been regulated by a recent statute. By 14 & 15 Vict. c. 25, if a tenant, with the consent of his landlord in writing, shall erect any farm building, whether detached from the soil or not, or put up any building, engine, or machinery, either for agricultural purposes or for purposes of trade and agriculture, such erections shall be his property, and may be removed, provided such removal can be done without injury to the freehold, and

before referred to, as containing the opinion of Mr. Justice Story,¹ that distinguished judge questioned whether the English doctrine was applicable to the circumstances of this country, and, in fact, seems clearly to have repudiated it. And in Massachusetts the rule applicable to trade fixtures was extended to an agricultural tenant; who was permitted to remove all improvements the removal of which would not injure the inheritance.² In New York, the common-law doctrine seems still to be adhered to.³ But if the thing in question is so constructed as not to become affixed to the land or house, it is a mere chattel, and cannot, under any circumstances, be considered a fixture. Thus, if a tenant erects a barn upon pattens and blocks of wood lying on the ground, it never has been treated as a fixture, but might always be removed.⁴ So a cider-mill and press, or a post and rail fence, erected by a tenant from year to year, have usually been held to be personal property, removable by him.⁵ And the erection

after giving the landlord a month's notice of his intention to remove them. But after receiving such notice the landlord may elect to purchase them at a valuation to be ascertained by two referees, to be chosen by the parties.

¹ *Van Ness v. Packard*, 2 Pet. 137.

² *Whiting v. Brastow*, 4 Pick. 310; applied in this case to a padlock used for securing a corn-crib, and to the boards for putting up corn in bins; and to posts and boards on a farm, if there is nothing to show that they are kept for the purpose of fencing, so as to convert them into realty. *Wing v. Gray*, 36 Vt. 261.

³ In *Dubois v. Kelley*, 10 Barb. 495, it was held that in an agricultural lease the tenant might at any time before the end of the term remove all erections; but in *Ombony v. Jones*, *supra*, the court of appeals refused to sanction the doctrine to this extent. Judge Comstock, delivering the opinion, says: "The rule as thus stated is, I think, laid down somewhat too broadly. The adjudged cases, I am confident, do not sustain a doctrine so general. On the contrary, the general maxim of the law is that whatever is affixed to the realty becomes part of it, and partakes of all its incidents and properties. This is the rule even in the relation of landlord and tenant; many exceptions have been grafted upon it; but the rule itself has not been reversed, and therefore it must not be lost sight of."

⁴ *Smith v. Benson*, 1 Hill, 176; *People v. Board of Assessors*, 93 N.Y. 308; *Culling v. Tuffnall*, Bull. N. P. 34; *Horn v. Baker*, 9 East, 215; *Anthony v. Haney*, 8 Bing. 186; *Davis v. Jones*, 2 B. & A. 165.

⁵ *Holmes v. Tremper*, *supra*; *Fitzherbert v. Shaw*, 1 H. Bl. 258.

of a chimney does not prevent the exercise of a right, which would otherwise have existed, of removing the surrounding buildings.¹

§ 549. How far Personal Property. — Removal of. — Removable fixtures are considered so far the personal property of the tenant that they may be stripped from the house and seized and sold under an execution against him, as his goods and chattels; and the tenant may sell or mortgage² them, although they are not distrainable for rent until after they shall have been permanently separated from the freehold by the tenant, for the purpose of being applied to some other use. But as a general proposition, it is correct to say that fixtures are completely personalty only as to the lessee's right of removal, but otherwise realty.³ On his death during the term they will go

¹ *Penton v. Robart*, 2 East, 88; *Van Ness v. Packard*, *supra*.

² But the mortgagee must remove them before the expiration of the term or the lessor's title becomes paramount. *Talbot v. Whipple*, 14 Allen, 182. It is also held that a mechanic's lien for repairs upon a building owned by the lessee may be enforced against the building as the property of the lessee. *McCarty v. Burnet*, 84 Ind. 23.

³ Hence, if he does not exercise this right, they pass to the owner of the land. But he may transfer this right: *Lond. & W. Loan Co. v. Drake*, 6 C. B. n. s. 798; *Hay v. Bruner*, 61 Pa. St. 87; or it may be availed of by his creditors: *Lemar v. Miles*, 4 Watts, 330; *Overton v. Williston*, 31 Pa. St. 160; *Hay v. Bruner*, *supra*; but the levy must be completed before the term ends. *Thropp's Appeal*, 70 *id.* 396. It has been held that fixtures are not leivable, as under an execution, but the cases so holding will be found to be of freeholder's fixtures: *Rice v. Adams*, 4 Harringt. 332; *Oves v. Ogelsby*, 7 Watts. 106; or of fixtures so annexed as to have lost the capacity of removal: *Pemberton v. King*, 2 Dev. 376. But until this right is exercised, fixtures partake of the nature of the realty. Thus, trover or replevin do not lie for them. *Roberts v. Dauphin Bank*, 19 Pa. St. 71; *Darrah v. Baird*, 101 *id.* 265; *Mackintosh v. Trotter*, 3 M. & W. 181; *Greene v. Cole*, 2 Wms. Saund. 259, b; *Wilde v. Waters*, 16 C. B. 437; *Roffey v. Henderson*, 17 Q. B. 574; *Guthrie v. Jones*, 108 Mass. 191; *Donnelly v. Thieben*, 9 Bradw. (Ill.) 495. Or *assumpsit* for goods sold and delivered, where they have not been severed. *Lee v. Risdon*, 7 Taunt. 188. And they are subject to a lien on the realty. *Morgan v. Arthurs*, 3 Watts, 140; *Gray v. Holdship*, 17 S. & R. 413; *Ex parte Young*, 1 Lowell, 386. "It may well be doubted whether the more sensible, as well as logical, rule would not have been that whenever the right of removal exists, the fixture retains its chattel nature even during

to his executor or administrator, and not to the heir; they are devisable, and by a conveyance pass to the vendee.¹ The tenant's right of removal, however, does not depend altogether upon the general law, but may be governed by a special custom, or the *lex loci*; and the principles we have formerly noticed under the head of emblements, relative to the effect of usage in regulating the general relation of landlord and tenant, are equally applicable to the law of fixtures. But such usage will never be permitted to contravene an express agreement; and therefore buildings, though erected for the purposes of trade, cannot be removed by the lessee, if the lease contains an express covenant to repair, and *yield up*, at the end of the term, buildings which shall have been erected during the term.²

§ 550. Must be capable of Removal without Injury to the Freehold. — The rule in regard to the removal of fixtures, however, requires that the article *be capable of removal*, without the destruction or serious injury of the freehold; that is, the premises must be in as good plight and condition after the removal as they were before annexation.³ And it is a

annexation and that therefore either trover or replevin would lie, even before a severance from the realty, in favor of him having the right of removal against the owner of the realty who, upon demand, refuses him the right to enter and remove.” Stout v. Stoppel, 30 Minn. 56; and see Shapira v. Barney, *id.* 59.

¹ Walker v. Sherman, 20 Wend. 636; 9 Cow. 307.

² Naylor v. Collinge, 1 Taunt. 21; Thresher v. E. Lond. W. Works, 2 B. & C. 608; Gott v. McManus, 47 Cal. 58. So salt-pans are not removable if there is a covenant to leave salt-works in good repair. Mansfield v. Blackburne, 6 Bing. N. C. 426. So Wilson v. Whately, 1 Johns. & H. 426. And by such an agreement the title passes at once to the landlord, subject to the tenant's use during the term, and vests at once in the purchaser. Sale of them by the lessor before the expiration of the lease. Thrall v. Hill, 110 Mass. 378; Storer v. Hunter, 3 B. & C. 368. And where a right for tenant to remove at the end of the term is subject to the landlord's right to take at a valuation, the building retains its character as realty. Griffin v. Marine Co., 52 Ill. 130.

³ Whiting v. Brastow, 4 Pick. 310; Kirwan v. Latour, 1 Har. & J. 289; Lawton v. Lawton, 3 Atk. 13; Turner v. Cam. Coal Co., L. R. 5 Q. B. 125. But a tenant empowered by the terms of his lease to place machinery upon the premises is held not to be liable for unavoidable damage done to the freehold in removing it. Hunt v. Potter, 47 Mich. 197.

question for a jury to determine in all cases, pursuant to these principles, whether a given article is removable or not.¹ It is to be understood, also, that whenever a fixture is removed, the tenant must fully repair any injury which the premises may have sustained by the act of removal. Or if an article has been put up in substitution of another, which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former, or to replace it by another erection of a similar description.²

§ 551. Time within which Tenant may remove. — The decisions also agree, that whatever fixtures the tenant has a right to remove, must be removed before his term expires, or at least before he quits possession; for if the tenant leaves the premises without removing them, and the landlord takes possession, they become the property of the landlord.³ The ten-

¹ *Avery v. Cheslyn*, 3 Ad. & E. 75; *Winslow v. Merch. Ins. Co.*, 4 Met. 306. A tenant may prove a license by parol, to remove buildings, to be erected by him on the leased premises, although given at the time of executing the lease, and not included in it. *Dubois v. Kelly*, 10 Barb. 495.

² *Re Stevens*, 2 Lowell, 496; *Foley v. Addenbrooke*, 13 M. & W. 197. "And the true principle seems to be that the annexation of a chattel to the freehold by a tenant is a conditional gift thereof to the landlord which may be defeated by its timely removal, but otherwise becomes absolute." 2 Smith, Lead. Ca. 257 (5 Am. ed.).

³ *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Lyde v. Russell*, 1 B. & Ad. 394; *Lee v. Risdon*, 7 Taunt. 191; *Thomas v. Crout*, 3 Bush, 37; *White v. Arndt*, 1 Whart. 91; *Pemberton v. King*, 2 Dev. 376; *Gaffield v. Hapgood*, 17 Pick. 192; *Stockwell v. Marks*, 17 Me. 455; *Brooks v. Galster*, 51 Barb. 196; *Beers v. St. John*, 16 Conn. 322; *Lawrence v. Kemp*, 1 Duer, 363; *Shepard v. Spaulding*, 4 Met. 416; *Preston v. Briggs*, 16 Vt. 124; *Haflick v. Stober*, 11 Ohio St. 482; *Moore v. Smith*, 24 Ill. 515; *Josslyn v. McCabe*, 46 Wisc. 591; and see *Youngblood v. Harris*, 68 Ga. 630. So where the tenant has surrendered; and even as against his mortgagee. *Talbot v. Whipple*, 14 Allen, 177. Or a creditor whose levy is not complete, if the landlord did not know thereof. *Thropp's App.*, 70 Pa. St. 396; but if a purchaser of the fixtures is in treaty for a lease, the landlord cannot divest his rights to the fixtures by accepting a surrender from the tenant. *Saint v. Pilley*, L. R. 10 Exch. 137. But where a lessee contracted to sell his fixtures to A. and surrendered in order that a

ant's right to remove is rather considered a privilege allowed him than an absolute right to the things themselves. If he does not exercise the privilege before his interest expires, he cannot do it afterwards; because the right to possess the land and the fixtures as part of the realty vests immediately in the landlord; and although the landlord has no right to complain, if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as part of his property.¹ Nor is this any injustice to the tenant; since it is his

new lease might be made to A., in pursuance of an arrangement between all the parties which was not carried out, it was held that in law the lessee was estopped from claiming his improvements or the value thereof. *Stewart v. Munford*, 91 Ill. 58. The right of removal is not acquired by a subsequent tenant. *Dingley v. Buffum*, 57 Me. 381.

¹ That the right of removal is determined by forfeiture and re-entry, see *Whipple v. Dewey*, 8 Cal. 36; *Pugh v. Arton*, L. R. 8 Eq. 626; see also *Lyde v. Russell*, 1 B. & Ad. 394; *Davis v. Eyton*, 7 Bing. 154; *Weeton v. Woodcock*, 7 M. & W. 14. So by a judgment in ejectment. *Minshall v. Lloyd*, 2 id. 450; *Mackintosh v. Trotter*, 3 id. 184. In *Peck v. Knox*, 1 Sweeny, 311, the articles in controversy were chattels, and the question of title to fixtures did not arise. In *Re Stevens*, 2 Lowell, 496, this doctrine of the effect of forfeiture is criticised, and *Stansfield v. Portsmouth*, 4 C. B. N. s. 120, relied on. But this latter case proceeded on a special agreement, and is distinguished in *Pugh v. Arton*, *supra*, which holds the English law as stated in the text. The case of *Re Stevens* was a notice to quit only; but this makes no difference, for by the clear weight of authority the right of removal does not continue when the tenant is a trespasser; and a notice to quit or of the landlord's election to avoid the lease renders him so quite as effectually as an entry. The law imposes no obligation on a landlord to pay the tenant for buildings erected by him on the demised premises. The rule that all buildings become part of the freehold has been relaxed only so far as to give the tenant a right of removal while he remains in possession. *Kutter v. Smith*, 2 Wall. 491; *Griffin v. Ransdell*, 71 Ind. 440. In Maine, it seems that the tenant is entitled to a reasonable time after the determination of the term in which to remove buildings. See *Sullivan v. Carberry*, 67 Me. 531, where by the terms of his lease the tenant had the right to remove buildings erected by him *at the expiration of the term*. These words were construed to give him the right of removal within a reasonable time after the expiration of the term. But five months having elapsed, and a judgment for restitution not being enforced, the tenant

own fault if he suffers the land to return to the landlord with the fixtures annexed. This rule had its foundation in the presumption of abandonment, arising from the conduct of the tenant in quitting the premises and leaving his fixtures behind him; and hence the presumption could not arise, so long as the tenant retained actual possession, even so far as to become a trespasser.¹ But the doctrine has been restricted by later cases to a right of removal only during the original term, and such further time as the lessee shall hold the premises under a right to consider himself a tenant.²

stayed in another month and then commenced the removal of the building; and it was held that the right of removal was forfeited. *Smith v. Park*, 31 Minn. 70; and see *Kuhlmann v. Meier*, 7 Mo. App. 260.

¹ *Penton v. Robart*, 2 East, 88. In this case a tenant had underlet a part of the premises to an under-tenant, who erected a building for the purpose of making varnish, in which he carried on his trade, and after the term had expired, the landlord was obliged to bring a suit against the under-tenant, to recover possession of the premises, who thereupon pulled down the building and carried away the materials while the suit was pending; the court were of the opinion that he had a right to do so, for that, being in possession of the premises at the time the things were taken away, there was no pretence for saying he had abandoned his claim to them. *Davis v. Jones*, 2 B. & A. 165. In *Weeton v. Woodcock*, *supra*, however, the court say, "the rule to be collected from the several cases decided on this subject, seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period as he holds the premises, under a right still to consider himself as tenant." See also *Roffey v. Henderson*, 17 Q. B. 574. And in *Heap v. Barton*, 12 C. B. 274, Ld. C. J. Jervis says, "The courts seem to have taken three separate views of the rule: first, that fixtures go, at the expiration of the term, to the landlord, unless the tenant has, during the term, exercised his right to reserve them; secondly, as in *Penton v. Robart*, that the tenant may remove the fixtures, notwithstanding the term has expired, if he remains in possession of the premises; and, thirdly, that his right to remove them after his term has expired is subject to this further qualification, namely, that the tenant continues to hold the premises under a right still to consider himself as tenant." The right to remove fixtures remains so long as the tenant remains in possession, and until it has been judicially determined that a forfeiture has taken place, and the landlord is repossessed by legal process. *Keogh v. Daniell*, 12 Wisc. 163.

² *Weeton v. Woodcock*, *supra*. This rule is stated in *Heap v. Barton*, *supra*, by Jervis, C. J., without, however, deciding upon it; and see *Roffey v. Henderson*, *supra*. In *Leader v. Homewood*, 5 C. B. n. s. 546, 553, Lond. & W. Loan Co. v. Drake, 6 id. 798, 810, the rule is declared

§ 552. Renewal or Surrender as determining Right to remove.

— If a tenant, at the close of his term, renews his lease, or surrenders it, for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to remove such fixtures, as he had a right to sever under the old tenancy. For where his continuance in possession is under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation as if the landlord, being seised of the land together with the fixtures, had demised both to him.¹ But if, in consequence of a verbal agreement with his landlord to purchase the fixtures, a tenant neglects to remove them during the term, he cannot be supposed to have abandoned them to his landlord.² There are cases, also, in

to be fully established. The law seems to be the same in this country. *Mason v. Fenn*, 13 Ill. 525, 527; *Merritt v. Judd*, 14 Cal. 59; *Davis v. Moss*, 38 Pa. St. 346, 353; *Overton v. Williston*, 31 *id.* 155; *Antoni v. Belknap*, 102 Mass. 193; *Croomie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, *id.* 142. But such right of removal must be exercised in a reasonable time, and in *Burk v. Hollis*, 98 Mass. 55, six weeks after the end of the lease was held an unreasonable time to wait. In *Cornish v. Stubbs*, L. R. 5 C. B. 334, the question is discussed, but *obiter*, as the chattels there were not fixtures.

¹ *Shepard v. Spaulding*, 4 Met. 416; *Watriss v. Camb. Bk.*, 124 Mass. 571; *Loughran v. Ross*, 45 N. Y. 792; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Thresher v. E. Lond. W. Works*, 2 B. & C. 608; *Lee v. Risdon*, 7 Taunt. 188; *Colegrave v. Dios Santos*, 2 B. & C. 79. So where a tenant holding over and becoming a tenant at will assigns to one who holds also at will, the right to remove the fixtures was held to end on such transfer. *Dingley v. Buffum*, 57 Me. 381. In *Kerr v. Kingsbury*, 31 Mich. 150, the court, in an elaborate opinion, by Cooley, J., disapproves the doctrine of *Loughran v. Ross* and other cases, *supra*, and holds that a regard for succeeding rights being the reason of the general rule, this should not obtain in cases where the tenant retains possession. And it was accordingly held, upon the facts, that the tenant's fixtures were not brought within a mortgage of the realty by the tenant's neglect to remove them upon the renewal of his lease by a new landlord.

² *Hallen v. Runder*, 3 Tyrw. 959; *Stansfield v. Portsmouth*, 4 C. B. N. s. 120; *Sumner v. Bromilow*, 34 L. J. Q. B. 130. Nor if he has a verbal agreement with his landlord that he may afterwards remove them. *McCracken v. Hall*, 7 Ind. 30. Nor where, having bought them of the lessee, he is under treaty for a lease when the lessee surrenders. *Saint v. Pilley*, L. R. 10 Exch. 137. So of course where the tenant is prevented from removing fixtures by the act of the landlord, as by injunction to

which, from the very nature of the tenancy, the lessee must have the privilege of removing fixtures after the termination of his interest; such as where he holds under any uncertain term or contingency, as for life, or at will, or upon the happening of an event. In such cases, no presumption of gift arises, the property still remains in the tenant, and he may remove it after his term shall have ended, provided he exercises that right within a reasonable time.¹ It is for a similar reason that an exception to the rule prevails in favor of nurserymen; for in the case of a lease for the purpose of nurturing trees and plants until they are ready to be transplanted, in the absence of any express agreement, the interest of the tenant in the land, for the purpose contemplated by the parties will be held to continue until that purpose is accomplished; and the tenant will be allowed to cultivate the trees until they can be properly transplanted, and then to remove them.²

that effect before the term expires or by attachment, he may remove them after the expiration of the term and on the dissolution of the injunction. *Bircher v. Parker*, 40 Mo. 118; *Mason v. Fenn*, 13 Ill. 525; *Goodman v. Han. & St. J. R. R.*, 45 Mo. 33; *Re Stevens*, 2 Lowell, 496.

¹ *Weeton v. Woodcock*, *supra*; *Haffick v. Stober*, 11 Ohio St. 482; *Lawton v. Lawton*, 3 Atk. 18; *North. Cent. R. R. v. Canton Co.*, 30 Md. 347. In *Antoni v. Belknap*, *supra*, where the lease was determined by the landlord's revocation, two months was held not an unreasonable time to remove an ice-house containing two thousand tons of ice.

² *Miller v. Baker*, 1 Met. 27; *Whitmarsh v. Walker*, *id.* 313; *King v. Wilcomb*, *supra*. In this case, Mr. Justice Harris remarks: "The ancient rule that whatever was attached to the freehold by the tenant became part of the freehold, and could not afterwards be removed by him, has gradually been relaxed in favor of the tenant, until now I understand the general rule to be, that any one who has a temporary interest in land, and who makes additions to it, or improvements upon it, for the purpose of the better use or enjoyment of it, may, while such temporary interest continues, at any time before his right of enjoyment expires, rightfully remove such additions and improvements. If he omit to sever the addition or improvement until his right of enjoyment ceases, such omission is to be deemed an abandonment of his right, and thereafter the addition or improvement he has made becomes, to all intents, a part of the inheritance; and the tenant, as well as any other person who severs it, becomes a trespasser. I think this may now be stated to be the general rule in respect to fixtures which a tenant attaches to the freehold. To this extent the original rule of the common law, *quicquid plantatur solo solo cedit*, has yielded to the changed condition of society. Public policy,

§ 553. Title to, vests in Landlord on Tenant's quitting Possession. — Whenever the tenant quits possession of the land without removing his fixtures, the property in them immediately vests in the landlord, and though they may be subsequently severed, the tenant's right to them does not revive. This was held in a suit brought by a tenant from year to year, for bells, pulls, cranks, and wires, which he had hung at his own expense; after he quit possession the landlord took down the bells, intending to sell them, and refused to deliver them to the tenant, but the tenant was not allowed to recover.¹ Where a tenant, therefore, has a right to remove fixtures, and wishes to leave them on the premises after the expiration of the term, for the purpose of valuing them to an incoming tenant, or for any other purpose, it can only be done with his landlord's consent; for if, without such consent, they remain on the premises after the expiration of the term, the tenant loses his property in them.²

§ 554. Custom as to particular Articles.—Agreements. — The rights of parties respecting particular articles will, however, be especially in this country, requires that the tenant should be permitted so to use the premises he occupies as to derive the greatest amount of profit and comfort consistent with the rights of the owner of the freehold. There may be exceptions to the general rule I have stated; but I think they will be found limited to cases where the removal of the additions or improvements made by the tenant would operate to the prejudice of the inheritance, by leaving it in a worse condition than when the tenant took possession.”

¹ *Lyde v. Russell*, 1 B. & Ad. 394. Where in a lease it was stipulated that at the end of the term the buildings to be erected by the lessee should be appraised by three disinterested persons, and be paid for by the lessor at the appraised value,—it was held that when the term expired, the buildings passed to the lessor, under the obligation to pay for them, but not wholly dependent on the making of an appraisalment in the particular manner specified; but that, to maintain an action for their value, the lessee must show that he did all that was reasonably in his power to procure an appraisalment. *Hood v. Hartshorn*, 100 Mass. 117.

² *Minshall v. Lloyd*, 2 M. & W. 450. But the acceptance of an under-lease of land, *with all the privileges belonging thereto, as enjoyed by the outgoing tenant*, does not subject the sub-lessee to the obligation of a covenant, in the original lease, to leave all buildings which the lessee might erect during the tenancy. *Ombony v. Jones*, 19 N. Y. 234.

much regulated by custom ; and, therefore, where it has been usual to value a particular article, between outgoing and incoming tenants, the custom becomes a proper criterion for determining the nature of the property, and whether it is a *fixture* or not.¹ A tenant may, by the terms of his agreement, not only vary his rights as to the description of articles he is entitled to remove, but may enlarge the time of their removal ; and even subject himself to greater restrictions, or secure to himself greater privileges in the ultimate disposition of them than would attach to him merely as tenant. As, for example, where he has, by the terms of his lease, the privilege of selling his fixtures by valuation to an incoming tenant, his property in the fixtures would not determine at the expiration of the lease, but he will still have a right of onstand upon the premises.² He may, in the same way, acquire an unlimited power of removing things which he affixes to the freehold ; and if his demise for years contains the clause *without impeachment of waste*, this condition will have the same effect as if it were inserted in the demise of an estate for life.³ By entering into special conditions of this nature, the parties entirely change the situation in which they would stand to each other, from the mere relation of landlord and tenant ; and the claims in controversy would in such cases resolve themselves into questions of construction, where the only point for determination is whether the article in ques-

¹ *Davis v. Jones*, 2 B. & A. 166. The relative rights of landlords and tenants have been in these respects regulated in England by 14 & 15 Vict. c. 25, § 3, which provides that if any tenant, with the written consent of his landlord, erects any farm buildings or machinery for agricultural purposes, or for the purposes of trade and agriculture, they shall remain the property of the tenant; but he cannot remove them without first giving his landlord thirty days' written notice of his intention, when the landlord may elect to purchase them of the tenant, at a valuation to be fixed by two referees.

² *Beaty v. Gibbons*, *supra*; *Burn v. Miller*, 4 Taunt. 745; *Kuhlmann v. Meier*, 7 Mo. App. 260. But such a valuation involving a determination of what is due the landlord for rent, the incoming tenant's title will not accrue until the rent is discharged, and this he may pay as part of the valuation. *Stafford v. Gardiner*, L. R. 7 C. P. 242.

³ *Com. Dig. tit. 8, c. 2, § 12.*

tion falls within the terms of the agreement or not.¹ It is not unusual, however, for the sake of avoiding disputes, to insert clauses in the lease for removing fixtures, as that the tenant shall have liberty to remove all the machinery and erections he may put up, and the like.² It may be almost unnecessary to observe, that where, at the time of making a demise, nothing is said respecting the fixed articles which belong to the premises, the tenant will be entitled to the use of them during his tenancy, as part of the demised property ; and the landlord cannot afterwards, and before the expiration of the term, remove them or insist upon their being valued or paid for by the tenant. The tenant's interest in all such articles is similar to that which holds with respect to trees ; for if he severs them the right of possession reverts to the landlord.³

¹ Rex *v.* Topping, Trin. T. 6 Geo. IV.; Stansfield *v.* Portsmouth, 4 C. B. n. s. 120.

² Dryden *v.* Kellogg, 2 St. Lo. Mo. App. 87. Such buildings become personal property by force of the agreement subject only to the payment of rent. *Id.*

³ Farrant *v.* Thompson, 5 B. & A. 826.

CHAPTER XIII.

THE LANDLORD'S REMEDIES.

§ 555. **Respective Remedies of the Parties, what.**—The respective rights and duties of landlord and tenant having been disposed of, it remains to explain the various remedies or means by which those rights may be enforced. These remedies naturally fall under the twofold division of, 1. The landlord's proceedings against the tenant; and, 2. Those of the tenant against the landlord. Of the former class are those for the recovery of rent by distress, or by actions which at common law are known as actions of debt, assumpsit, covenant, or bill in equity; actions to prevent waste, or recover damages for its commission; and actions to recover possession of the premises, by ejectment, or by summary proceedings under the statute. The latter class comprehends actions formerly known as actions of replevin, trespass, case, and covenant; while proceedings for a forcible entry and detainer are common to both landlord and tenant. This last proceeding, however, is punishable rather as a breach of the peace than as an offence against the property of an individual, and, as such, is indictable at common law; but in our observations we shall regard it simply as a private remedy, incident to the relation of landlord and tenant. And we propose to adhere to the common-law distribution of remedies as now enumerated; for, although the statutes of many of the United States have abolished the long-established distinctions between actions at law and suits in equity, with their respective forms, and have substituted one form of action for the enforcement or protection of all private rights and the redress of all private wrongs, while in others the forms of actions are much simplified,—yet the distinctive principles which govern all remedies are still retained; and legislative action seems thus

far to have resulted in removing the technical distinctions between legal and equitable remedies, and the blending into one tribunal of the several functions formerly performed by separate courts of law and equity, or in uniting in two or three classes the various forms of actions at law, but still leaving the general principles of pleading untouched. We think, therefore, the course we have indicated, that of retaining the former division of actions, will be found both perspicuous and convenient in treating of the remedies connected with the subject of our essay.

SECTION I.

OF A DISTRESS FOR RENT.

§ 556. **History of the Remedy.**—A distress for rent is one of the most efficient of the landlord's remedies for the collection of rent,—enabling him to secure a regular remuneration for the tenant's occupation, by seizing the goods and chattels which have enjoyed the shelter and protection of his premises, holding them in pledge for a period, giving the tenant an opportunity to redeem, and then, after reasonable notice, to proceed and sell them in satisfaction of the debt. The proceeding is said by Lord Chief Baron Gilbert to have been derived from the civil law;¹ by which land that was let to the tenant was hypothecated, or held in pledge, to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to be sold for the payment and satisfaction of it. It is certainly a remedy of very high antiquity, and is known to have prevailed among the Gothic nations of Europe immediately after the breaking up of the Roman Empire, and from them was probably carried into

¹ Gilbert on Rents, 3, 26, 92. By the Roman law, a landlord's lien for the rent of his farm was confined to the produce of the field, and did not extend to implements of husbandry or cattle; but in the case of a house rented, all the movables in the house were liable to distress for the rent. Dig. 20-27.

England.¹ The English statutes, from the days of Magna Charta to the present time, have regulated, and in some instances extended, its provisions to meet the exigencies of the times. Our State legislatures have generally adopted, and sometimes modified, the English statutes, recognizing the proceeding as a salutary and necessary remedy, equally conducive to the security of the landlord and the welfare of society; but they seem now to be gradually abolishing this ancient remedy, as giving an undue advantage to landlords over other creditors, in the collection of their debts.

§ 557. Nature of the Remedy.—The ancient definition of a distress was the taking of the personal chattel of a wrong-doer into the possession of the party aggrieved, as a pledge for the performance of a duty, or the satisfaction of a wrong committed; and the distrainor was bound to hold the pledge in his custody until the pledgor thought proper to redeem it. This power was given to the lord in lieu of a forfeiture, for the purpose of compelling the tenant to perform those services which were the consideration of his enjoyment of the land; but the distress was considered to be merely a pledge, and the detention thereof was justifiable only so long as the duties incident to the tenure remained undischarged. If the tenant offered gages and pledges for the performance of the services, and the lord, after such offer, persisted in detaining the distress, the tenant might sue out a writ of replevin; which was considered so much a matter of right that if a person by deed granted a rent, with a clause of distress, and granted further that the distress taken should be irrepleviable, yet it might be replevied, because such a restriction was held to be contrary to the nature of a distress.² But in modern times the

¹ Spelman's Gloss. *Parcus*. See 3 Kent, Com. 485, for a sketch of the policy and bearings of this provision of law.

² 1 Inst. 45, b. Lord Kaimes's Law Tracts, No. 4, says: "It is not difficult to discover the foundation of the privilege of distraining for rent. Lands originally were occupied by bondmen, who were themselves the property of the landlord, and consequently were not capable of holding any property of their own; but such persons, who had no interest to be industrious, and who were under no compulsion when not under the eye of a master, were generally lazy and always careless. This made it eligi-

whole policy of the law respecting distress has been changed, and a distress for rent is now no more than a summary method of seizing and selling the tenant's property to satisfy the rent which he owes.¹

§ 558. **In what States it Exists.** — The common law of England, and most of her statutory provisions regulating a distress for rent, have been generally adopted in the United States.² In the New England States, the law of attachment on *mesne* process has superseded the law of distress for rent; but under their attachment laws, the principles of the common-law doctrine of distress have been essentially assumed, subject to the same checks and limitations which, under the English statute law and modern decisions, have modified and improved it.³ The State of New York has abolished this remedy, regarding it as an invidious distinction in favor of a particular class of creditors, which has survived similar remedies applicable to other debts, sometimes operating unjustly towards

ble to have a free man to manage the farm, or to let it out upon shares, by which the tenant only had a claim, by virtue of the contract, for that part of the produce he was entitled to. The whole fruits, as *pars soli*, belonged to the landlord while growing upon the land, and the act of separating them from the ground could not transfer the property in them to the landlord. As the nature of leases gradually changed, and their value to the tenants increased, the products of the soil came to be considered the property of the tenant; but the landlord's property in them to the extent of his rent continued inviolable, and to this limited extent he was still considered proprietor. He therefore continued to levy his rents by his own authority; for no man needed the authority of a judge to lay hold of his own goods; and it made no difference whether rents were payable in money or in kind."

¹ Distress for rent is not a suit at common law, or under the statute. The only legal proceeding therein is for the court to determine if the relation of landlord and tenant exists. *Alwood v. Mansfield*, 33 Ill. 452. See *Kassing v. Keohane*, 4 Bradw. (Ill.) 460.

² *Hartshorne v. Kiernan*, 2 Halst. 29; *Hoskins v. Paul*, 4 *id.* 110; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Garrett v. Hughlett*, 1 Har. & J. 3; *Charleston v. Price*, 1 McCord, 299; *Ridge v. Wilson*, 1 Blackf. 409; *Owens v. Connor*, 1 Bibb, 607; *Biddle v. Biddle*, 3 Har. 539; *Mayo v. Winfree*, 2 Leigh, 370; *Burket v. Boude*, 3 Dana, 209; *Hale v. Burton*, Dudl. 105; *Terrel v. Ligon, Walker*, 170; *Dutcher v. Culver*, 24 Minn. 584.

³ *Potter v. Hall*, 3 Pick. 368.

other classes of creditors who are supposed to be equally entitled to protection. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common-law process of distress for rent does not exist in that State; and to the same effect are the laws of Missouri.¹ It is, however, now in force in South Carolina; and the statute of 1808 even allowed a landlord to distrain for double rent, where a tenant held over for three months after notice to quit.² In Georgia, the authority of a landlord to levy a distress warrant is not confined to the demised premises, but extends to the tenant's property wherever it may be found in the county.³ In Alabama, Tennessee, and Ohio there are no statutory provisions on the subject, except one in the latter State, to secure the landlord's share of the crops from execution against the tenant, and one in the former confining the remedy to the city of Mobile.⁴ Mississippi has abolished it by statute, but property cannot be taken in execution on the premises, unless a year's rent, if it be due, shall be first tendered to the landlord,⁵ who has also a lien on the growing crop.⁶ To the same effect are the statutes of Wisconsin;⁷ while in Louisiana the landlord may follow the furniture removed from his premises for fifteen days after removal; and if removed without his consent, he may seize the goods wherever he can find them, and sell them to satisfy his claim, provided they continue to be the property of the lessee.⁸

¹ *Dalgleish v. Grandy, Cam. & Nor.* 22; *Deaver v. Rice*, 4 *Dev. & B.* 431; *Crocker v. Mann*, 3 *Mo.* 472.

² *Talvande v. Cripps*, 3 *McCord*, 147; *Reeves v. McKenzie*, 1 *Bailey*, 497. This remedy was abolished at one time, and restored by the act of June 8, 1877. *Mobley v. Dent*, 10 *S. C.* 471; and see *Jones v. Clarkson*, 16 *id.* 1.

³ *Hale v. Benton, Dudley*, 105; *McMahon v. Tyson*, 26 *Ga.* 43. Any justice of the peace may issue the warrant. *Holland v. Brown*, 15 *id.* 113; *Thornton v. Wilson*, 55 *id.* 607.

⁴ *Griff. Law. Reg.* 404; *Dumes v. McLoskey*, 5 *Ala.* 239.

⁵ *Cornell v. Rulon*, 4 *Miss.* 54; *Peck v. Critchlow*, 8 *id.* 243.

⁶ *Arbuckle v. Nelous*, 50 *Miss.* 556. ⁷ *Wisc. Laws*, 1866, p. 77.

⁸ Civil Code of Louisiana, Arts. 2675, 2679, 3185. Under these provisions the right of the lessor is superior to that of the tenant's assignee in bankruptcy. *Marshall v. Knox*, 16 *Wall.* 551.

§ 559. How Limited in Certain States.—By the laws of Illinois, a landlord cannot distrain the goods of an under-tenant, for the want, as is said, of a privity of contract between them; and a tenant may defend on the ground of his having been evicted from a portion of the premises;¹ or may recoup the damages he has sustained by reason of the landlord's act in impairing the value of the use of the premises.² The landlord also has a statutory lien for rent on the entire crop raised in any one year for the rent of that year, and also on the tenant's personal property. He may follow the former into the hands of a purchaser, or attaching creditor,³ but not the latter, as the lien thereto only accrues upon levy.⁴ In Indiana, all goods found on the premises are liable to be seized, except such as are exempt by common law, or by the statute regulating distress for rent.⁵ In Kentucky, it is only allowed when the rent is payable in money; and such goods as have been sold cannot be followed after they have been removed from the premises, nor can such as are under a *bona fide* mortgage.⁶ Maryland adopted the statute 2 Will. & M. c. 5, as the basis of her proceedings, but modified them by act of 1834, c. 192; and holds that the taking of security for rent does not bar the landlord's remedy by distress, nor exempt goods which have been fraudulently removed from the premises.⁷ New Jersey allows even the joint ownership of the goods and chattels of a tenant to be sold; and permits a mortgagee to distrain for rent due to the landlord, if the mortgage is subsequent to the lease, and the mortgagee has,

¹ Gray *v.* Rawson, 11 Ill. 527; Wade *v.* Halligan, 16 *id.* 507.

² Lynch *v.* Baldwin, 69 Ill. 210.

³ Prettyman *v.* Unland, 77 Ill. 206; Mead *v.* Thompson, 78 *id.* 62; Thompson *v.* Mead, 67 *id.* 395; Hunter *v.* Whitfield, 89 *id.* 229; Wetsel *v.* Mayers, 91 *id.* 496.

⁴ Hadden *v.* Knickerbocker, 70 Ill. 677; Morgan *v.* Campbell, 22 Wall. 381.

⁵ Stevens *v.* Lodge, 7 Blackf. 594; Richardson *v.* Vice, 4 *id.* 13.

⁶ Poer *v.* Peebles, 1 B. Monr. 1; Mitchel *v.* Franklin, 3 J. J. Marsh. 477; Snyder *v.* Hitt, 2 Dana, 204; Hood *v.* Hanning, 4 *id.* 21.

⁷ Giles *v.* Ebsworth, 10 Md. 333; Dorsay *v.* Hays, 7 Har. & J. 370; Keller *v.* Webber, 27 Md. 660.

given notice to the tenant not to pay to the landlord.¹ Pennsylvania adopts the common-law doctrines of distress, and the landlord's right is not limited to the duration of the term, but the statute permits him to exercise it as long as the rent remains unpaid, and he continues owner of the premises.² In Virginia, it lies for rent in arrear, whether payable in money or in produce.³ In the District of Columbia, a lien upon all the tenant's chattels on the premises is given by statute.⁴ Texas and other States where distress exists are regulated by the common-law rules.⁵

§ 560. Lies for all Rents reserved on Lands or Tenements. — At common law, as we have seen, *rent-service* was the only kind of rent to which distress was incident, and an express power to distrain was annexed to the rents in grants in fee after the statute of *quia emptores*.⁶ The distinctions, however, as to distress between the different kinds of rents were abolished in England by the statute 4 Geo. II. c. 28, which gave the remedy of distress in all cases of *rent-seck*, as well as of rent reserved generally upon a lease; and such was the effect of the Revised Statutes of New York, which was almost a transcript of the English statute. Previous to this statute, a distress could only be taken by him who had a reversionary interest in the premises; and if a man made a feoffment, or lease in fee, reserving rent, but leaving no reversion in him-

¹ *Allen v. Agnew*, 24 N. J. 443; *Sanders v. Van Sickle*, 8 *id.* 313. See *Woodside v. Adams*, 11 Vroom, 417.

² *Adams v. Lacomb*, 1 Dall. 440; *Moss's Appeal*, 35 Pa. St. 162. Ground rents are rent-services of which distress is a necessary incident; but a grantor who has not reserved his rent by a valid deed cannot enforce it by that means, because the statute of *quia emptores*, which would have converted the rent service into a rent-charge, is not in force in Pennsylvania, and it cannot exist independently of the deed, because titles in this State are allodial, and not feudal. *Wallace v. Harmstad*, 44 Pa. St. 492.

³ *Brooks v. Wilcox*, 11 Gratt. 411; 1 Rev. Code, c. 111.

⁴ Act 1867, Feb. 22. And this lien will follow the goods into the possession of any one who receives them with notice thereof. *Fower v. Rapley*, 15 Wall. 328.

⁵ *Weir v. Brooks*, 17 Tex. 638; 1 Cranch, C. C. 410.

⁶ *Ante*, § 370, and note.

self, he could not distrain for such rent, unless he had expressly reserved a power of distress.¹ The statute separated the right of distress from the reversion to which it had before been incident, and placed all rents upon the same footing as if the power of distress had been expressly reserved. In all those States, therefore, where this statute has been adopted, that which before the statute of *quia emptores* would have been a *rent-seck* becomes a *rent-charge*; and a grantor who has reserved rent may in all cases distrain for it, though he has no reversion.² But it is to be observed that the statute provides for no reservation which would not at least amount to a *rent-seck* at common law, issuing out of lands and tenements. And as rent therefore cannot issue out of a mere chattel,³ it has been repeatedly held, since the statute, that if a lessee for years assigns his whole term, reserving rent, but without a special clause authorizing a distress, he cannot distrain upon such reservation, and his only remedy is upon the contract between himself and the assignee.⁴

§ 561. Actual Demise at fixed Rent a Pre-requisite to.—
There can be no distress unless there has been an actual demise at a certain fixed rent, either in money, produce, or services, payable at a time certain; or unless the amount, if not fixed, is capable of being reduced to a certainty by calculation.⁵ As where the rent is payable in iron, in cotton,

¹ *Prescott v. De Forest*, 16 Johns. 159; —— *v. Cooper*, 2 Wils. 375; *Smith v. Mapleback*, 1 T. R. 441; *Cornell v. Lamb*, 2 Cow. 652; *Co. Lit.* 143, b.

² *Bradbury v. Wright*, Doug. 624; *Schuylar v. Leggett*, 2 Cow. 660.

³ *Co. Lit.* 47, a, 142, a; *Walker v. Denne*, 2 Ves. 170.

⁴ *Palmer v. Edwards*, Doug. 187; *Burne v. Richardson*, 4 *Taunt.* 720; *Parmenter v. Webber*, 8 *id.* 593; *Preece v. Corrie*, 5 *Bing.* 24.

⁵ *Valentine v. Jackson*, 9 *Wend.* 302; *Dunk v. Hunter*, 5 *B. & A.* 322; *Grier v. Cowan, Addis.* 347; *Wells v. Hornish*, 3 *Pa.* 30; *Reeves v. McKenzie*, 1 *Bailey*, 500; *Jacks v. Smith*, 1 *Bay*, 315; *Dutcher v. Culver*, 24 *Minn.* 584; *Johnson v. Prussing*, 4 *Bradw. (Ill.)* 575; *Thrasher v. Gillespie*, 52 *Miss.* 840. Thus where the rent is to be fixed by arbitration. *Myers v. Mansfield*, 7 *Bush*, 212. So, where in an agreement for the occupation of premises no time is specified when the tenancy is to expire, or when the rent is to accrue, the terms are too vague and indefinite to constitute such a renting as would authorize a distress. *Dailey v. Grimes*, 27 *Md.* 440.

or in repairs to be put upon the demised premises to a certain specified amount; in one third of the tolls of a grist-mill;¹ or by shearing all the sheep depasturing in the landlord's manor, by way of rent, without putting it at a certain value in money in the lease, although the number of sheep may vary from time to time; for this is capable of being reduced to a certainty by referring to the usual number of sheep, and then calculating the price or value of shearing them.² But this mode of computation is to be taken with the qualification that it must not be subject to continual deductions,—as, for the erection of new buildings, or the like;³ nor will a claim for an unliquidated amount of rent, without an express contract, authorize a distress.⁴

§ 562. Certain Rent.—Tenant not in Full Possession.—In a case where the lease reserved an annual rent of three dollars an acre for all improved land on the demised premises, the tenant agreeing to build a certain quantity of stone fence, part at so much per rod, and the residue for such price as might thereafter be agreed upon by the parties, the whole to be applied to the payment of the rent,—it was held that these latter provisions did not make the rent so uncertain as to prevent the landlord from distraining.⁵ And though the

¹ *Smith v. Colson*, 10 Johns. 91; *Fry v. Jones*, 2 Rawle, 11; *Jones v. Gundrim*, 3 W. & S. 531; *Watkins v. Taliaferro*, 52 Ga. 208; *Cornell v. Lamb*, *supra*. Rent payable in anything susceptible of valuation may be distrained for. *Frazer v. Davis*, 5 Rich. 59.

² Co. Lit. 96, a. So when the rent is to be proportioned to the improvements put on the place by the lessor. *Detwiler v. Cox*, 75 Pa. St. 200. In South Carolina, it is said no distress will lie, unless the rent is expressly reserved, and that the reservation of a specific sum as rent, *eo nomine*, is the true criterion of a party's right to distrain for rent in arrear. *Marshall v. Giles*, 2 Const. R. 637. In Indiana, distress will not lie where a tenant contracts to deliver, *as rent*, one third of the corn he shall raise on the premises. *Clarke v. Fraley*, 3 Blackf. 264.

³ *Regnart v. Porter*, 7 Bing. 451. Where rent is payable in "American gold coin" the landlord may distrain for the market value of that amount of coin reckoned in United States legal tender notes. *Kaufman v. Myers*, 38 Ga. 133.

⁴ *Roberts v. Termell*, 4 J. J. Marsh. 160.

⁵ *Smith v. Fyler*, 2 Hill, 64; *Detwiler v. Cox*, *supra*.

tenant hold under a void lease, it may still be resorted to as evidence to make the rent for the current year certain, and so confer a right of distress on the landlord.¹ But if the premises are demised at a fixed rent, and the tenant enters, but is prevented from obtaining the whole of the premises by a person holding part under a prior lease executed by the landlord, the latter has no right to distrain for a proportionable part of the rent reserved, by deducting the value of the part held under the prior lease, and demanding the residue; though in such case he might be entitled to recover in an action of *use and occupation* upon a *quantum meruit*.²

§ 563. Actual Demise essential to.—Agreement to Lease insufficient.—In order to sustain a distress, the relation of landlord and tenant must be actually completed and exist between the parties, and not merely be in contemplation; there must be an actual demise, and not a mere agreement for a lease.³ But when this relation is once established, the right of distress is incident thereto, and enures to those who succeed thereto without any special reservation of a power to that effect, and it can only be taken away by proof of an eviction, or by that which amounts to a dissolution of the tenancy.⁴

¹ Edwards *v.* Clemons, 24 Wend. 480.

² Lawrence *v.* French, 25 Wend. 443.

³ Schuyler *v.* Leggett, 2 Cow. 660; Jacks *v.* Smith, 1 Bay, 315; Dunk *v.* Hunter, *supra*. And when a lease under seal was made by an agent in his own name it was held that his undisclosed principal could not distrain. Seyfert *v.* Bean, 83 Pa. St. 450. If the relation of landlord and tenant has been terminated by a surrender, although such surrender provides that the tenant shall remain liable for rent, the landlord cannot distrain; his remedy is on the special agreement. Bain *v.* Clark, 10 Johns. 424. But a surrender after distress made for rent due will not render the distress unlawful. Nichols *v.* Dusenbury, 2 N. Y. 283.

⁴ Prescott *v.* DeForest, 16 Johns. 159; Hill *v.* Stocking, 6 Hill, 277; Hegan *v.* Johnson, 2 Taunt. 148; Knight *v.* Benett, 3 Bing. 361; Coupland *v.* Maynard, 12 East, 134; Wade *v.* Halligan, 16 Ill. 507. Thus on a devise of a rent-charge each of the several devisees has a right of distress annexed to his parcel. DeCoursey *v.* Guar. Tr. Co., 81 Pa. St. 217. Property may be distrained although the landlord has taken it in trust with other property, for the benefit of creditors. Dutcher *v.* Culver, 24 Minn. 584. Under the Illinois statute, R. S. 1879, c. 80, § 14,

It will, however, only continue so long as that relation subsists,¹ and the landlord will not possess this right in cases where the tenant is simply occupying the premises, as a mere tenant at will, and without any express agreement as to the amount of rent to be paid; or has been let into possession under an agreement for a lease to be subsequently executed;² or has quit the premises after the term has expired.³ Nor can he apportion the rent for a part of the premises occupied by the tenant, where he has not put his tenant in possession of the whole premises.⁴ But the tenancy that will authorize a distress need not necessarily be in writing, nor in any particular form; for a lease may be inferred from circumstances,⁵ — as, the admission by a party holding under an agreement of a charge of half a year's rent, in an account between him and his landlord, or the payment of a previous quarter's rent.⁶

§ 564. Holding Over, Effect of on the Right. — Other Circumstances. — So a holding over, after the expiration of a lease for a year, is a continuation of the former tenancy, and subjects the tenant to a distress, whether the first demise be by deed or parol.⁷ And the right subsists if the lease under which the tenant holds is void under the statute; for though it may be void as a lease for the term, it yet enures as a tenancy from year to year, and must regulate the terms on which the tenancy subsists in all other respects except its duration.⁸

giving the right of distraint to the landlord's "grantee, heir, assignee, or personal representative," the lessor's heir may distrain but not one merely holding the inheritance. *McGillick v. McAllister*, 10 Bradw. (Ill.) 40.

¹ *Scruggs v. Gibson*, 40 Ga. 519; *Smith v. Turnley*, 44 *id.* 243; *Walbridge v. Pruden*, 102 Pa. St. 1.

² *Farrington v. Baley*, 21 Wend. 65.

³ *Williams v. Terboss*, 2 Wend. 148.

⁴ *Hatfield v. Fullerton*, 24 Ill. 248.

⁵ *Cornell v. Lamb*, 2 Cow. 652; *Jacks v. Smith*, 1 Bay, 315; *Knight v. Benett*, 3 Bing. 361.

⁶ *Cox v. Bent*, 5 Bing. 185.

⁷ *Webber v. Shearman*, 3 Hill, 547; s. c. 6 *id.* 20; *Mann v. Lovejoy, Ry. & M.* 355; *Doe v. Smith*, 1 Mood. & R. 187.

⁸ *Schuyler v. Leggett*, 2 Cow. 660; *ante*, § 528.

Nor is it divested by the death of the tenant.¹ Where, however, the lessor refused to give the lessee possession of the premises on the day fixed in the lease, and the lessee subsequently occupied the premises, not under the lease, but under a new and different agreement by parol, the lessor was held not to be entitled to distrain on the first contract.² A right of re-entry, in default of payment of rent, reserved in the lease, does not divest the right of distress;³ and on the demise of a grist-mill, the lessee to render one third of the toll, it was held the lessor might distrain;⁴ nor is it essential that it be reserved as rent, for if it appear to be for the use and occupation of lands or houses, it is sufficient, though not denominated rent.⁵ In Pennsylvania, it seems to have been doubted whether a right of distress existed where the rent was payable in *grain* or other produce; but it was held that a distress in such a case, as for *money*, was clearly illegal.⁶ And in Kentucky it has been decided that a landlord may distrain for rent payable in specific articles, and may hold, though he cannot sell, the goods distrained.⁷

§ 565. Effect of Judgment for Rent.—Note.—Bond.—Agreement for Re-entry.—Surrender, etc. — At common law, the right of distress is not extinguished by an unsatisfied judgment for rent;⁸ for, as a general rule, the acceptance of an obligation of an inferior, or even of an equal degree, does not extinguish a prior obligation. Nor will the mere fact of taking a promissory note for rent prejudice a landlord's right to distrain,

¹ *Keller v. Webber*, 27 Md. 660; or administration granted: *Merkle v. O'Niel*, 6 Blackf. 306; otherwise in Kentucky: *Hughs v. Sebre*, 2 A. K. Marsh. 227.

² *Spencer v. Burton*, 5 Blackf. 57.

³ *Smith v. Meanor*, 16 S. & R. 375.

⁴ *Fry v. Jones*, 2 Rawle, 11.

⁵ *Price v. Limehouse*, 4 McCord, 546.

⁶ *Warren v. Forney*, 13 S. & R. 52.

⁷ *Owens v. Conner*, 1 Bibb, 606.

⁸ *Snyder v. Kunkelman*, 3 Pa. 490; *Chipman v. Martin*, 13 Johns. 240; *Bantleon v. Smith*, 2 Binn. 146; *Bates v. Nellis*, 5 Hill, 651. But it is held that a landlord waives his lien on property seized on a distress warrant by proceeding thereafter to take out a personal judgment against the tenant, without foreclosing his lien. *Wise v. Old*, 57 Tex. 514.

unless there is an agreement that it shall operate as a suspension of the right; for a note is but an acknowledgment of the debt, and does not alter its nature until paid;¹ and will not, even if accompanied by a security for the rent, suspend the right of distress until it becomes due.² But if a note is taken in absolute payment of rent, the landlord's only remedy is upon the note.³ So the acceptance of a bond for rent, or an order drawn upon a person not in funds, is held not to extinguish this right, although a receipt in full for the amount of rent due was taken;⁴ nor where a lease provides that the landlord shall have a lien for his rent upon all the property of the tenant upon the premises, notwithstanding the lien so reserved may be more extensive than that given by statute.⁵ Nor is the right to distrain at the end of the year affected by an agreement in the lease that the landlord may re-enter if the rent is unpaid at a stipulated period after the expiration of the year;⁶ or that he shall be allowed to charge interest on the rent in arrear.⁷ But a landlord cannot distrain upon the tenant's goods after the term has been surrendered; nor if he has treated the tenant as a trespasser, although the tenant remains in possession to the day of the distress;⁸ nor, as it

¹ Peters *v.* Newkirk, 6 Cow. 103; Snyder *v.* Kunkleman, 3 Penn. 487. Harris *v.* Shipway, Bull. N. P. 182; Vansteenbergh *v.* Hoffman, 15 Barb. 28; Wolgamot *v.* Bruner, 4 Har. & McH. 70; Atkyns *v.* Byrnes, 71 Ill. 326.

² Davis *v.* Gyde, 4 Nev. & M. 462; Bailey *v.* Wright, 3 McCord, 484; Cunnea *v.* Williams, 11 Bradw. (Ill.) 72. Rent due is not extinguished by taking a note and a chattel mortgage collateral to the note. Lofsky *v.* Maujer, 3 Sandf. Ch. 69; see *ante*, § 392.

³ Warren *v.* Forney, 13 S. & R. 52; Dent *v.* Hancock, 5 Gill. 120.

⁴ *Id.*; Cornell *v.* Lamb, 20 Johns. 407; Printemps *v.* Helfried, 1 Nott & McC. 187; O'Hara *v.* Jones, 46 Ill. 288.

⁵ Where a clause in the lease assigns to the lessor all the goods on the premises in case of non-payment of rent, and the lessor distrains the goods, and does not assert a title under the assignment, he is bound, while holding the goods under the distress, to act in all respects as if the tenant were the owner. Fernwood Masonic Hall Ass'n *v.* Jones, 102 Pa. St. 307. See Fames *v.* Mayo, 6 Bradw. (Ill.) 334.

⁶ Smith *v.* Meanor, 16 S. & R. 375; Lewis *v.* Lozee, 3 Wend. 79.

⁷ Skerry *v.* Preston, 2 Chit. 245.

⁸ Brydges *v.* Smyth, 2 Moore & P. 740; Jackson *v.* Sheldon, 5 Cow. 448; Newman *v.* Rutter, 8 Watts, 55; Greider's Appeal, 5 Pa. St. 422,

would seem, after he has given the tenant notice to quit, without some evidence of a renewal of the tenancy.¹ Neither can he make a second levy for the same rent after he has once levied a sufficient distress and then abandoned the proceedings.² An additional distress, however, for the same rent, will be allowed, if, by a mistake in the valuation of the goods distrained, he finds he has taken an insufficient distress, or if sufficient goods subsequently come upon the premises after he has exhausted his remedy against such as he could find.³ A surrender of a part of the premises, however, will not exempt the tenant from a liability to distress as to the residue.⁴ But where, upon the surrender of a lease, it was agreed that the tenant should remain liable for a year's rent, and that the lessor might take all lawful means for its recovery, according to the lease, it was held that the lessor could not distrain for such rent, but that his remedy was on the special agreement alone, since by the surrender the relation of landlord and tenant ceased.⁵ A landlord who agrees not to distrain the goods of an under-tenant, so long as he pays his rent to the original lessee, is not thereby prevented from distraining, unless he has notice of a tender of the rent by the under-tenant to his lessor.⁶

§ 566. Previous Demand not necessary. — Tender, effect of. —
A previous demand of rent is not generally necessary to confer

nor if the tenant has been deprived of a portion of the demised premises. *French v. Lawrence*, 7 Hill, 519.

¹ *Jenner v. Clegg*, 1 Mood. & R. 213.

² *Everett v. Neff*, 28 Md. 176; *Smith v. Goodwin*, 4 B. & Ad. 413. The lien of a distress, when made, is lost by the lessor's replevying, and he is left to his rights on the replevin bond. *Speer v. Skinner*, 35 Ill. 282.

³ *Hutchins v. Chambers*, 1 Burr, 589; *Horsford v. Webster*, 1 Cr. M. & R. 696. And see § 733. He may always recover any unpaid residue by action. *Cornell v. Lamb*, *supra*.

⁴ *Peters v. Newkirk*, 6 Cow. 103. In the case of the lease of an unfinished building, which was to be completed by the landlord, the tenant took possession and occupied the premises for two quarters, and then abandoned them, for the reason that the landlord had not completed them according to his agreement; the landlord was allowed to distrain for the second quarter's rent. *Nichols v. Dusenbury*, 2 N. Y. 283.

⁵ *Bain v. Clark*, 10 Johns. 424.

⁶ *Welsh v. Rose*, 6 Bing. 628.

a right of distress; but if a lease contains a reservation of rent, payable quarterly or half-yearly, *if required*, and the landlord receives rent for some time quarterly, he cannot afterwards distrain without notice to pay.¹ A legal tender of the amount due destroys the right of distress, though the tender is not made until after rent-day, or even after the proceedings in distress have been commenced, provided the expenses of such proceeding are also tendered.² The tenant may in fact claim a return of the goods at any time before they are actually sold, upon making such tender, and if the landlord refuses to deliver them, it is a wrongful detainer.³ But the tender must be made to the landlord and not to his bailiff, unless the latter is particularly authorized to accept or refuse it.⁴ When made to the distrainor's wife, however, who had been in the habit of acting as his agent in such matters, it was held sufficient.⁵ But it comes too late after cattle are actually impounded, for they are then in custody of the law.⁶ If the landlord proceeds with the distress after a tender, without a subsequent demand and refusal of the rent, the tenant's remedy is by action of trespass or replevin, or he may rescue the distress.⁷

§ 567. In whose Name to be Levied. — A distress for rent can only be made in the name of the person to whom the rent is due, and not in the name of his bailiff.⁸ Nor will an authority in writing to a tenant, to pay the rent to a third person, authorize a distress by such person.⁹ At common law, after a lessor parts with his reversion, he can neither

¹ Offutt *v.* Trail, 4 Har. & J. 20; Mallam *v.* Arden, 10 Bing. 299; Royer *v.* Ake, 3 Pa. 461; McCray *v.* Samuel, 65 Ga. 739.

² Hunter *v.* Le Conte, 6 Cow. 728; Williams *v.* Howard, 3 Munf. 277; Smith *v.* Goodwin, 4 B. & Ad. 413.

³ Six Carpenters' Case, 8 Co. 146, b; Hinton *v.* Blain, 2 Bailey, 168; Virtue *v.* Beasly, 1 Mood. & R. 21.

⁴ Pilkington's Case, 5 Co. 76; Moffat *v.* Parsons, 5 Taunt. 307.

⁵ Brown *v.* Powell, 4 Bing. 230.

⁶ Ladd *v.* Thomas, 12 Ad. & E. 117.

⁷ Co. Lit. 160, b; 8 Co. 147, a.

⁸ Swearingen *v.* Magruder, 4 Har. & McH. 347.

⁹ Ward *v.* Shew, 9 Bing. 608.

distrain upon the assignee nor the original lessee.¹ Yet a tenant from year to year, who underlet to another from year to year, is considered as not having parted with his whole interest, but retains such a reversion as enables him to distrain.² So if a tenant for life makes a lease for any number of years, no matter how impossible it may be that his life should last so long, he is still deemed to have a reversion in the premises.³

§ 568. Assignee of Reversion may distrain. — When a lessor assigns his reversion, the assignee may distrain; for the privity of contract which subsisted between the lessor and lessee is in such case transferred from the lessor to his assignee, by the statute of 32 Hen. VIII. c. 34, as well as by those American statutes which have adopted the English statute; and the assignee thereupon becomes entitled to all the remedies for rent that the lessor originally had, even without an attornment.⁴ But in order to confer upon such assignee a right to distrain, the lease of land should be included in the assignment; for a mere transfer of *the rent remaining unpaid*, which is only the transfer of a *chase in action*, does not carry with it the remedy by distress.⁵

§ 569. By Joint Tenants. — Coparceners. — Tenants in Common. — Any one of several joint tenants, being seised *per mi et per tout*, may distrain alone for the whole rent, although he must afterwards avow jointly with his companions, or make cognizance as their bailiff, and account to them for their respective shares. He may, therefore, appoint a bailiff to distrain for the whole rent, without the assent of his fellows.⁶ But coparceners before partition are considered but as one heir,

¹ *Preece v. Corrie*, 5 Bing. 24; —— *v. Cooper*, 2 Wils. 375; *Parmenter v. Webber*, 2 Moore, 656.

² *Curtis v. Wheeler, Mood. & M.* 493.

³ *Smith v. Day*, 2 M. & W. 684; *Rogers v. Humphrey*, 4 Ad. & E. 299.

⁴ 1 N. Y. R. S. 747, § 28; *ante*, §§ 439–443.

⁵ *Slocum v. Clark*, 2 Hill, 475.

⁶ *Pullen v. Palmer*, 3 Salk. 207; *Robinson v. Hoffman*, 4 Bing. 562; *Leigh v. Shepherd*, 2 B. & D. 465.

and must, therefore, all join;¹ after partition, however, they may make several distresses.² Tenants in common, not holding by one title and possessing several estates, although they may join in an action for rent,³ must distrain severally for their respective portions and avow separately.⁴ But upon a lease by tenants in common, the survivor of them may distrain for the whole rent, although the reversion be to the lessors according to their respective interest.⁵

§ 570. By Husband and Wife. — Guardians. — Executors. — Receivers. — A husband and wife may join, or the husband may distrain alone, for rents accruing from his wife's lands during the coverture.⁶ As guardians may grant leases, so they may distrain in their own names.⁷ The executor of a lessor may distrain for arrears of rent due at the time of the testator's death,⁸ but not for rent which shall have accrued subsequently to the death of the testator; for such rent, following the reversion, goes to the heir or devisee.⁹ A receiver in chancery may distrain without any special order of the court;¹⁰ but if there is a doubt in whom the legal right exists, he should get an order, as he must distrain in the name of the person having the legal right.¹¹ If, however, he has leased the premises in his own name, the tenant cannot deny his right to distrain, although he appears by the lease

¹ Steadman *v.* Bates, 1 Salk. 390.

² Co. Lit. 163, b.

³ Midgley *v.* Lovelace, Carth. 289.

⁴ Whitley *v.* Roberts, 1 McClel. & Y. 107; Harrison *v.* Barnsby, 5 T. R. 246; Snelgar *v.* Henston, Cro. Jac. 611; DeCoursey *v.* Guar. Tr. Co., 81 Pa. St. 217. But it is held that the improper joinder of tenants in common is, in those States where the St. 11 Geo. II. c. 19 is in force, an irregularity cured by the terms of that statute. Dutcher *v.* Culver, 24 Minn. 584. See § 613, *post*.

⁵ Wallace *v.* McLaren, 1 Mann. & R. 516.

⁶ Bowles *v.* Poore, Cro. Jac. 282; 2 Bulst. 233.

⁷ Bennet *v.* Robins, 5 Carr. & P. 379; Shopland *v.* Ryoler, Cro. Jac. 55; s. c., *id.* 98.

⁸ Duppia *v.* Mayo, 1 Wms. Saund. 287; 1 R. S. 747, § 21.

⁹ Wright *v.* Williams, 5 Cow. 501; DeCoursey *v.* Guar. Tr. Co., *supra*.

¹⁰ Pitt *v.* Snowden, 3 Atk. 750.

¹¹ Hughes *v.* Hughes, 3 Bro. C. C. 87.

to be only a receiver, and the rent is reserved to him in that character.¹

§ 571. By Mortgagees. — At common law, a mortgagee, after giving notice of the mortgage to the tenant in possession under a lease made prior to the mortgage, is entitled to such rent as shall be in arrear at the time of the notice, and to the rent accruing afterwards, and may distrain for it after such notice.² But in New York we have seen the mortgagee cannot have possession of the mortgaged premises, and is consequently not entitled to the rents of the estate; he cannot, therefore, under any circumstances be entitled to distrain, unless in the case of a tenant who attorns to the mortgagee after the forfeiture, which is allowed in New York, and in New Jersey.³ Neither is the common-law doctrine on this subject recognized in Pennsylvania.⁴ But as to a lease made by a mortgagor after the mortgage, the mortgagee cannot distrain until after he has received rent from the tenant,⁵ or given the tenant notice to pay rent to him, and received his consent;⁶ for this is equivalent to the creation of a tenancy from year to year, between the mortgagee and tenant, on the terms of the original lease. And although the mortgagee cannot compel the payment of rent from the tenant under these circumstances, yet, in such cases, the tenant will be justified in attorning and paying subsequently accruing rent to the mortgagee.⁷

§ 572. As respecting Duration of Term, when to be made. — At common law the lessor could only distrain during the continuance of the term; for, according to feudal principles, there must be a privity of estate between the tenant and the

¹ *Dancer v. Hastings*, 4 Bing. 2.

² *Moss v. Gallimore*, Doug. 279; *Sonders v. Van Sickles*, 3 Halst. 313; *King v. Housatonic R. R.*, 45 Conn. 226.

³ *McKircher v. Hawley*, 16 Johns. 289; 1 R. S. 744.

⁴ *Meyers v. White*, 1 Rawle, 353.

⁵ *Rogers v. Humphreys*, 4 Ad. & E. 299.

⁶ *Doe v. Boulter*, 6 Ad. & E. 675; *Magill v. Hinsdale*, 6 Conn. 464.

⁷ *Jones v. Clark*, 20 Johns. 51; *Smith v. Shepard*, 15 Pick. 149; and see *ante*, §§ 120-124.

person distraining.¹ The remedy was consequently gone upon the determination of the term, as the privity of estate was thereby destroyed; and for the last instalment of rent, accruing on the last day of the term, there was no right of distress, or any remedy but by action.² But the statute of 8 Anne, c. 14, which has been generally adopted in the United States, provided that the distress might be made at any time within six months after the determination of the lease, if the landlord's title or interest still continued, and the tenant remained in possession.³ As by this statute the landlord's interest must continue at the time of making the distress, if a tenant underlets, he cannot distrain upon the under-tenant after his own term has expired.⁴ The tenant must also appear to be in possession, to authorize such proceeding; and, therefore, where the leased premises are certain *specific apartments* in a dwelling-house, and the tenant removes to *other apartments* in the same house, taking with him his goods, the landlord cannot, for the purpose of making a distress for the rent of the first apartments, follow the goods after six months subsequent to the termination of the lease of those apartments.⁵ Nor does the statute intend to permit a landlord to distrain upon the goods of a succeeding tenant found on the premises, who has taken possession under a new and different demise, occupying under a different right, although derived from the landlord himself. Therefore where, on the expiration of a parol lease to two persons for a year, the landlord executed a new lease for years to one of them, who continued to occupy the premises alone, it was held that his goods could not be distrained for the rent of the preceding tenancy, though they were on the premises when the rent fell due and had remained there ever since.⁶ The goods of a third person, however, remaining on the premises during the time a tenant holds over, may be distrained for the rent of the original term,

¹ *Ante*, § 563.

² *Buszard v. Capel*, 8 B. & C. 141.

³ *Terboss v. Williams*, 5 Cow. 407; s. c. 2 Wend. 148; *Christman v. Floyd*, 9 *id.* 340.

⁴ *Burne v. Richardson*, 4 Taunt. 720.

⁵ *Bukup v. Valentine*, 19 Wend. 554; *Taylerson v. Peters*, 7 Ad. & E. 110.

⁶ *Bell v. Potter*, 6 Hill, 497.

though more than six months have elapsed since that term expired.¹

§ 573. **As respecting Rent-day, when may be made.** — With respect to the time of making a distress, it is to be observed that a distress can only be taken for rent in arrear ;² and as rent does not become due until the last moment of the day when it is made payable, a distress cannot be taken until the next day after the rent becomes due.³ But a warrant given on that day, to make distress generally, is good ;⁴ and if by the custom of the country, or by express stipulation between the parties, the rent is made payable on the day on which the tenant enters, it may be distrained for on that day.⁵ It cannot be made in the night, but must be taken in the daytime, after sunrise and before sunset.⁶ Nor can it legally be made after a tender of payment ; and a tender after distress, but before impounding the goods, will render the detainer illegal,⁷ though this would not be the effect of a tender after the distress is actually impounded.⁸ But where a lease stipulates that the rent shall be paid in advance, the landlord may distrain for it immediately upon the tenant taking possession of the premises ;⁹ or if, by the custom of the country, a distress may be taken for half a year's rent in advance, the custom is valid and forms part of the contract.¹⁰

¹ *Webber v. Shearman*, 3 Hill, 547; s. c. 6 Hill, 20. In this case the tenant had held from year to year, for three years, and the landlord distrained in the third year, for rent due the first.

² But by statute in Illinois, where the tenant is about to leave, even if he gives notice thereof, the landlord may distrain for rent to accrue as well as for rent in arrear. *Hare v. Stegall*, 60 Ill. 380.

³ *Gano v. Hart*, Hardin, 297; *Duppa v. Mayo*, 1 Saund. 287; 1 Inst. 47, b. n. 6.

⁴ *Gano v. Hart*, *supra*.

⁵ *Russell v. Doty*, 4 Cow. 576; *Williams v. Howard*, 3 Munf. 277; *Beyer v. Fenstermacher*, 2 Whart. 95; *Buckley v. Taylor*, 2 T. R. 600.

⁶ Co. Lit. 142, a; *Aldenbergh v. People*, 6 C. & P. 212; *Sherman v. Dutch*, 16 Ill. 283.

⁷ *Hunter v. Le Conte*, 6 Cow. 728. ⁸ *Firth v. Purvis*, 5 T. R. 432.

⁹ *Diller v. Roberts*, 13 S. & R. 60; *Russell v. Doty*, *supra*; *Peters v. Newkirk*, 6 Cow. 103; *Harrison v. Barry*, 7 Price, 690; *Williams v. Howard*, 3 Munf. 277.

¹⁰ *Buckley v. Taylor*, 2 T. R. 600.

§ 574. **G**enerally, to be made on the Premises yielding the Rent.—At common law, a distress can only be made upon some part of the demised premises out of which the rent issues. But upon any part of these it may be taken for the whole rent, even though the different parts be in different counties, because the whole rent issues out of every part of the land.¹ And if a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the premises of one for the whole rent, for it issues out of each part. But where there are separate and distinct demises, there must be separate distresses on the several premises subject to each distinct rent, although the several premises are demised to the same tenant.² As rent cannot issue out of a mere easement, or incorporeal hereditament, upon the demise of a room, with a right of common passage along an entry leading from such room into the public street, it was held that the landlord could not seize goods of the tenant kept in such common passage.³ For the same reason, a barge attached to a wharf by a rope was held in England not distrainable for rent of the wharf, though the land on which the wharf stood was demised, and the use of the land in the river Thames opposite to it, between high and low water mark, was also demised as appurtenant to the wharf, but not the land itself over which the barge floated when it was distrained.⁴ The owner of a wharf, however, may distrain for wharfage on any goods or chattels on board a ship or vessel which has been moored at his wharf, although the vessel has been removed from the wharf; and it is no objection to the distress that it is made at a place different from where the wharfage accrued, provided such place be within the jurisdiction authorizing the proceeding by distress.⁵

¹ *Burr v. Van Buskirk*, 3 Cow. 269; *Brown v. Duncan*, Harper, 338; *Mosby v. Leeds*, 3 Call. 439; 1 Roll. Abr. 671, l. 10.

² *Rogers v. Birkmire*, Stra. 1040. In Illinois, the levy may be made upon any property found within the county. *Uhl v. Dighton*, 25 Ill. 154. In such case the common-law doctrine which made the *locus in quo* traversable is inapplicable. *Lougee v. Colton*, 9 Dana, 123.

³ *Winslow v. Henry*, 5 Hill, 481.

⁴ *Buszard v. Capel*, 8 B. & C. 141; s. c. 6 Bing. 150.

⁵ *Nicholl v. Gardner*, 13 Wend. 288.

§ 575. Pursuit of Chattels removed to avoid Distress.—Estrays, when liable. — If, when the landlord comes to distrain cattle which he sees within his fee, the tenant or any other person, to prevent the distress, should drive the cattle away into some other place, the landlord may follow and take them; for in judgment of law, the distress will be considered as taken within his fee. But he cannot distrain them if they go off the premises of their own accord; nor can he pursue them if they have gone away before he discovered them.¹ So a constable of the town where the demised premises are situated, to whom a warrant is delivered to be executed, may pursue into another town, and take goods which have been fraudulently removed to avoid the distress.² At common law, if a stranger sent his horse or cattle upon the demised premises to pasture,³ or the cattle of a stranger broke through the fences and entered the tenant's land, they became immediately distrainable.⁴ It is so, also, if the owner of cattle is bound to repair the fences, and by his negligence in not repairing, his beasts escape into a neighbor's land.⁵ But when there are no sufficient fences to divide the tenant's from the stranger's lands, and it is the tenant's duty to keep the fences in order, the landlord cannot distrain such cattle until after the owner has had notice to remove them; and then, if he neglects, they become liable.⁶

§ 576. Of Goods removed.—Rules in certain States. — The American statutes, following that of 11 Geo. II. c. 19 in general, furnish another exception to the rule that the distress can only be taken on the demised premises, by allowing the landlord to pursue and seize them, where they have been removed for the purpose of avoiding the distress. The English statute only applies where the removal has occurred *secretly and fraudulently*;⁷ and the landlord is bound to show

¹ 1 Co. Inst. 161, a.

² Christman v. Floyd, 9 Wend. 340.

³ Francis v. Wyatt, 3 Burr. 1498.

⁴ Co. Lit. 74, b; Webber v. Tivill, 2 Saund. 124.

⁵ Gill v. Gavin, 2 Roll. 124.

⁶ Lutw. 1580; Dyer, 317, b.

⁷ Opperman v. Smith, 4 Dowl. & R. 33. A landlord cannot follow and distrain his tenant's goods, which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress, the tenant's

this, and also, that no sufficient distress remained on the premises after such removal.¹ In Pennsylvania, the goods must have been removed after the rent became due, to authorize the landlord to follow them;² and such removal must have been fraudulent.³ And after such a removal, in Maryland, the goods may be distrained for thirty days, notwithstanding the lease may have expired and the tenant have quitted the premises.⁴ Under the landlord-and-tenant act of New Jersey, they may be followed within thirty days after removal, for rent which accrued subsequent to the removal.⁵ In Louisiana, if the tenant removes his goods and abandons the premises, he becomes liable for the rent of the whole term, due and to become due; but the execution only issues for the rent actually payable as it becomes due.⁶ In Kentucky, where the tenant is about to remove his effects, an attachment for rent lies before it is due, if the rent be payable in money.⁷ And there are statutes in most of the other States which authorize a distress for rent after the tenant has removed his effects from the premises.⁸

interest in the goods has ceased, and he is no longer in possession of them. For, under St. 11 Geo. II. c. 19, § 1, a distress was allowed only where the goods would have been distrainable if they had remained on the premises; and this provision was not changed by St. 8 Anne, c. 14, § 6. *Gray v. Stait*, 11 Q. B. D. 668.

¹ *Parrey v. Duncan*, Mood. & M. 533.

² *Grace v. Shively*, 12 S. & R. 217.

³ *Purfel v. Sands*, 1 Ashm. 120.

⁴ *Dorsey v. Hays*, 7 Har. & J. 370.

⁵ *Weiss v. Jahn*, 37 N. J. 93.

⁶ *Reynolds v. Swain*, 13 La. 193.

⁷ *Poer v. Peebles*, 1 Ky. 1; 3 Kent, Com. 482, n.

⁸ A stipulation or covenant is often inserted in a lease giving the landlord a "lien," or sometimes a pledge or mortgage of the tenant's personal property as security for the rent. This is generally held to confer a specific title to the property, which will operate by way of irrevocable license or reservation, and prevail over the claim of a purchaser, attaching creditor, or assignee in bankruptcy, or mechanic's lien, and follow the goods or their proceeds, though removed from the premises. *Hale v. Omaha Bk.*, 50 N. Y. 626; overruling s. c. 41 N. Y. Sup. 207; *Groton Co. v. Gardner*, 11 R. I. 621; *Dalton v. Laudahn*, 27 Mich. 529; *McCaffrey v. Woodin*, 65 N. Y. 459; *Schenley's App.*, 70 Pa. St. 98; and see *ante*, § 158, n. 1.

§ 577. Goods of Strangers generally not Liable after Removal.

—This statute applies only to the goods of the original lessee and his assignee, which have been removed from the demised premises; and not to those of a *stranger* found on the premises,¹ or to goods taken by a creditor therefrom with the assent of the tenant, in payment of a *bona fide* debt, though the creditor knows the rent is due, and apprehends the landlord may distrain.² Nor does it apply to the goods of an under-tenant, which have been removed before the rent became due;³ and a plea that justifies the following of goods off the premises must, therefore, aver that they were the tenant's goods.⁴ A mortgagee is deemed a tenant *sub modo*, and protected within the saving clause of the statute in favor of subsequent purchasers in good faith; and, therefore, personal property taken by a *bona fide* mortgagee from the premises by virtue of the mortgage, is not subject to pursuit after removal.⁵ And where a tenant assigned his goods to provide for the payment of *bona fide* debts, and the goods were removed from the premises, the right to distrain was held to be at an end, although the creditors had notice that rent was about to become due.⁶ So also, after a receiver appointed at the suit of a creditor has taken possession of the goods and removed them.⁷ And this right is a strict legal right, and is not therefore favored in equity. Rent is a lien upon the tenant's goods so long as they remain upon the demised premises, and, at common law, the right was gone the moment they were removed, for the landlord had parted with his lien,—possession, or what is equivalent to possession,

¹ *Frisbey v. Thayer*, 25 Wend. 39; *Martin v. Black*, 9 Paige, 641.

² *Slocum v. Clark*, 2 Hill, 475; *Coles v. Marquand*, *id.* 447; *Adams v. La Comb*, 1 Dall. 440; *Davis v. Payne*, 4 Rand. 332.

³ *Acker v. Witherell*, 4 Hill, 112.

⁴ *Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 Carr. & P. 225.

⁵ *Frisbey v. Thayer*, *supra*. But see *Reynolds v. Shuler*, 5 Cow. 323. The mortgagor in possession of mortgaged chattels has of course such interest in them as may be seized on distress. *Holladay v. Bartholomae*, 11 Bradw. (Ill.) 206.

⁶ *Hastings v. Belknap*, 1 Den. 109.

⁷ *Martin v. Black*, 3 Edw. 805.

being always necessary to the existence of a lien.¹ But this statute, which gives him a right to follow the goods after their removal, does not continue such lien after the removal; it simply provides an additional remedy, without creating a new lien upon the goods. And as equity never interferes in behalf of a creditor who has not acquired a lien upon his debtor's property, nor to restrain the latter from making such a disposition of his property as he may think proper, it will not compel a defendant to disclose where the goods which have been removed have been deposited, in order that they may be seized by a distress warrant, or delivered up to be sold under a decree, to satisfy the rent.²

§ 578. Sufficient Acts of Distraint.—Entry to Distain.—When a landlord makes a distress, he may seize upon *any article in the name of all the goods in the house*;³ and a declaration by him that nothing should be removed until his rent was paid has been held sufficient to authorize him to follow an article which had been removed.⁴ So where a broker went into the tenant's house and pressed for payment of rent alleged to be due, and a sum for the expenses of the levy, but touched nothing, and made no inventory, and the tenant then paid the rent and expenses under protest,—it was held, in an action against the landlord for an excessive distress, that he could not say there had been no distress.⁵ He may enter into any house or building, either through the doors or windows;⁶ but if these are fastened, he cannot lawfully break them open, for enclosures or fences cannot be broken to take a distress.⁷

¹ *Trappan v. Morie*, 18 Johns. 1; *Williams v. Leper*, 3 Burr. 1889; *Sweet v. Pym*, 1 East, 4; *McCombie v. Davies*, 7 *id.* 5.

² *Reed v. Darrow*, 2 Edw. 412; *Wiggins v. Armstrong*, 2 Johns. Ch. 144.

³ *Dod v. Monger*, 6 Mod. 215.

⁴ *Wood v. Nunn*, 5 Bing. 10; *Furbush v. Chappel*, 105 Pa. St. 187.

⁵ *Hutchins v. Scott*, 2 M. & W. 809.

⁶ 1 Roll. Abr. 671, l. 7, 17. An entry made by opening a window which is shut, but not fastened, is unlawful. *Nash v. Lucas*, L. R. 2 Q. B. 590; *Cate v. Schaum*, 51 Md. 299. But the entry may lawfully be made by further opening a window which is partly open. *Crabtree v. Robinson*, 15 Q. B. D. 312.

⁷ *Co. Lit.* 161, a; *Semayne's Case*, 5 Co. 91. Even though the property

And where a padlock had been put upon a barn-door, the landlord was held to be a trespasser by breaking it, in order to seize the corn in the barn.¹ But if the outer door be open, the inner may be broken;² and this, though such inner room is in the exclusive possession of the plaintiff, under an occupation separate from the rest of the house; or if, after having once entered lawfully, the officer is forcibly turned out of possession, he may break the door and re-enter.³ To make an officer a trespasser, it is enough that the outer door be shut; lifting a latch is as much a breaking, in law, as the forcing a door bolted with iron.⁴ Whatever would be a breaking of an outer door in burglary is an unlawful breaking by a sheriff; even the sliding down of a window, fastened by pulleys, would be such a breaking.⁵ And if an officer breaks open an enclosure, and takes goods when he is not justified in doing so, he not only renders himself liable to an action of trespass, but the court or a judge will restore the goods to the person from whom they were so taken.⁶

§ 579. By whom to be Levied. — At common law, a distress for rent might be levied by the landlord, or by any private person authorized by him for that purpose, although he could not sell the property so distrained; but the English, as well as many of the American statutes regulating distress and authorizing sale thereof, now require as a check to the abuse which might otherwise be practised in the exercise of this right, that *the proceeding shall be conducted by a legal officer.*⁷ And the appointment of one who as agent of his wife had

be fraudulently deposited in the house to prevent a distress. *Dent v. Hancock*, 5 Gill. 120.

¹ 9 Vin. Abr. 128, pl. 6.

² *Williams v. Spencer*, 5 Johns. 352; *Comb. 17*; *Brown v. Dunn*, Bull. N. P. 81; *State v. Thackam*, 1 Bay, 358; *Ratcliffe v. Burton*, 3 B. & P. 223; *State v. Armfield*, 2 Hawks, 246.

³ *Eagleton v. Gutteridge*, 11 M. & W. 465.

⁴ But see *Cate v. Schaum*, *supra*.

⁵ *Curtis v. Hubbard*, 1 Hill, 336.

⁶ 1 Chit. Arch. Pr. (7th ed.) 410; 2 Bac. Abr. Execution (N).

⁷ *Ferguson v. Moore*, 2 Wash. 58; *Wells v. Hornish*, 3 Penn. 33; *Smith v. Ambler*, 1 Munf. 596.

sued out a distress warrant, to execute and return the same, was in Georgia held to be illegal and void; for that the words *special bailiff* in their code, do of themselves import some proper officer of the law who is to execute the warrant.¹

§ 579 a. Landlord's Affidavit; Particulars of.— Still further to protect the rights of the tenant, the statutes also require a preliminary affidavit to be made by the landlord previous to his taking the distress. In regard to which great particularity is necessary to be observed; for as the affidavit of rent due is the foundation of the whole proceeding, any material error in it will vitiate all future proceedings, and render the landlord a trespasser. It should specify the time during which the rent accrued, not merely the amount claimed and the time when it became due; although it was held sufficient to state the amount claimed to be for one quarter's rent, which fell due on a specified quarter-day.² If the rent is payable in grain or other specific article, its true market value at the time it was payable must be shown.³ It must state facts, and set out the contract as it is, not its mere legal effect.⁴ In Georgia, it can only be made by the person to whom the rent is due, though in general it is enough when made by an agent.⁵ In summary proceedings of this character, a justice of the peace or other officer who issues the warrant, has no judicial power to go behind the affidavit, and determine whether rent be due or not; the proper method of contesting a landlord's claim, or right to distrain, being to take back the goods seized, on giving security in an action of replevin. But in some States where this preliminary question of indebtedness may be gone into before the justice, on the return of the warrant to him, the plaintiff's affidavit is no evidence of the defendant's indebtedness, if he denies it in a counter affidavit; for in that case the plaintiff must show himself entitled to the

¹ Flury v. Grimes, 52 Ga. 341.

² Marquissee v. Ormston, 15 Wend. 368; Jenkins v. Pell, 17 id. 417.

³ Williams v. Talliafero, 52 Ga. 208; Jones v. Gundrim, 3 W. & S. 531.

⁴ Moulton v. Norton, 5 Barb. 286.

⁵ Howard v. Dill, 7 Ga. 52; Mitchell v. Franklin, 3 J. J. Marsh. 471.

amount he claims, otherwise the warrant will be dismissed.¹ And the landlord cannot mingle with or add to the amount due for rent a claim on any other account; nor can the tenant set off any claims against the landlord, except payments of rent.²

§ 580. **Warrant of Distress; Particulars of.**—In addition to this affidavit, the landlord must also give to the officer whom he employs an authority, in writing, called in the statute a “warrant of distress.”³ As to which no particular form is necessary: it is sometimes in the shape of a power of attorney, and is always sufficient if it substantially indicates the object intended, so as to enable the officer to execute it; and it need not be under seal.⁴ Neither is it necessary that an agent who directs the distress should have written authority from the landlord; for the statute only requires that the officer making the distress should act under a warrant in writing, and, therefore, an agent of the landlord may sign the warrant as agent for his principal, and make the affidavit also.⁵ At common law, if an agent or bailiff proceeds to distrain goods without an express authority from his principal, and the principal afterwards assents to it, it is a good distress, and will have relation back to the time when the distress was taken.⁶ But a distress warrant signed by “A., agent for B.” is a good execution of the authority conferred on the agent.⁷

¹ Commonwealth *v.* Colgan, 5 B. Mon. 485; Reid *v.* Brinson, 37 Ga. 63; Harris *v.* McFaddin, 2 Blackf. 71; Given *v.* Blann, 3 *id.* 64; Assay *v.* Sparr, 26 Ill. 115; and see *post*, title Replevin, and action for Wrongful or Irregular Distress, chapter xv.

² Sketoe *v.* Ellis, 14 Ill. 75.

³ In Mississippi, security must be given to support a distress for rent, or other process of attachment. Cornell *v.* Rulow, 4 Miss. 54.

⁴ The warrant of distress need not set out a description of the premises. Alwood *v.* Mansfield, 33 Ill. 452.

⁵ Bigelow *v.* Judson, 19 Wend. 229. No written authority is required in Pennsylvania. Franciscus *v.* Reigart, 4 Watts, 98; Jones *v.* Gundrim, 3 W. & S. 531.

⁶ Gilbert, Distress, 32; Duncan *v.* Meiklehan, 3 Carr. & P. 172; Wood *v.* Nunn, 5 Bing. 10.

⁷ Bigelow *v.* Judson, *supra*; Stackpole *v.* Arnold, 11 Mass. 27; Brockway *v.* Allen, 17 Wend. 40.

§ 581. Arrears of Rent Included, but not Damages.—All the arrears of rent arising during the tenancy may be included in one proceeding, though the rent of several years should happen to be in arrear, since the Statute of Limitations does not apply to these cases.¹ And therefore, if a tenant enters upon the premises under a lease for two years, and continues in possession nine years, paying no rent, the landlord may, by one distress, remunerate himself for the rent accrued during the whole nine years; and so for any other period. And if the property be taken from his possession by a writ of replevin, he may in one avowry acknowledge the taking for the whole nine years as upon one entire lease.² A distress, however, can only be taken for *rent*, and not for damages for the delay of payment, and therefore interest cannot be included in the amount distrained for; and if interest is collected by a distress, the party distrained upon may recover back the excess by an action on the case.³

§ 582. Inventory and Custody of the Goods.—When the officer has been thus legally authorized to distrain, he enters upon the premises, and makes a seizure of such things as are or have been upon the demised premises, and are legally⁴ liable for rent. He then proceeds to take an inventory of so many of such goods as he shall judge to be sufficient to cover

¹ *Braithwaite v. Cooksey*, 1 H. Bl. 465; *Wright v. Williams*, 5 Cow. 501; *Blake v. Deliesseline*, 4 McCord, 496; *Longwell v. Redinger*, 1 Gill. 57. In Illinois, a distress taken more than six months after the rent became due, and the lease terminated, and the premises abandoned, is illegal and void, affording no protection to the officer levying it. *Werner v. Ropisquet*, 44 Ill. 522. The landlord is required to credit on the rent in arrear only actual payments, and such sums as the parties have agreed to treat as payments on account of rent. He is under no legal obligation to deduct any claim for unliquidated damages which the tenant may have against him. *Spencer v. Klinefelter*, 101 Pa. St. 219.

² *Sherwood v. Philips*, 13 Wend. 479; *Vechte v. Brownell*, 8 Paige, 212.

³ *Lansing v. Rattoone*, 6 Johns, 43; *Bantleon v. Smith*, 2 Binn. 153; *Dennison v. Lee*, 6 Gill & J. 383; *Vechte v. Brownell*, *supra*; *Skerry v. Preston*, 2 Chit. 245.

⁴ The goods of a tenant cannot be distrained unless they have been on the premises. *Bradley v. Pigot, Walker (Miss.)*, 348.

the rent distrained for, together with the charges of the distress. And it is generally proper for him to have a person with him when he makes the distress and inventory, and also when he serves the notice thereof, to examine the same, and attest, if there be occasion, to the regularity of the proceedings. The safest way, perhaps, is to remove the goods immediately to some convenient place, and in the notice required by the statute, to inform the tenant where they have been carried; but it is usual to let them remain on the premises until they are sold, leaving a person in charge, or taking security for their forthcoming.

§ 583. All Movables on Premises subject to, at Common Law.—Rule Changed in Certain States.—As to the goods that may be taken upon a distress for rent, they are in general all the movable goods and chattels which may be found upon the premises, whether they be the goods of the tenant, under-tenant, or other person.¹ The necessity of this rule is obvious when we consider by what varieties of fraud and collusion the rights of the landlord are liable to be defeated, if he is to be restricted to such goods only as he can prove to be the property of the tenant. Nor is there in reality any hardship in it, as a stranger, who may happen to have his goods upon the premises, can at any time before the landlord actually levies his distress, remove them, and the landlord has no

¹ *Spencer v. McGowen*, 13 Wend. 256; *Thornton v. Adams*, 5 M. & S. 38; *Kessler v. McConachy*, 1 Rawle, 435; *O'Donnell v. Seybert*, 13 S. & R. 57; *Weidell v. Rosberry*, *id.* 180; *Howard v. Ramsay*, 7 Har. & J. 113; *Davis v. Payne*, 4 Rand. 332; *Reeves v. McKenzie*, 1 Baily, 497. And notwithstanding the decease of the tenant. *Keller v. Webber*, 27 Md. 660. And it is held that a constitutional provision exempting the wife's property from the debts of her husband does not exempt from distress chattels found on the premises and belonging to the wife of a third party. *Kennedy v. Lange*, 50 Md. 91. A sub-lessee whose immediate landlord holds under a lease prohibiting sub-letting, and whose tenancy has not been recognized by the paramount landlord, whether or not his rent to his immediate landlord be in arrear, has no right upon a distress by the paramount landlord to demand that the goods of his immediate landlord on the premises be first distrained upon, and that resort to his own goods be had only when the proceeds of the former goods are insufficient. *Jimison v. Reifsneider*, 97 Pa. St. 136.

right to follow them. But in Virginia, Kentucky, Illinois, New Jersey, and Mississippi, the property of strangers found upon the premises is exempt from distress, by the statutes of those States.¹ And in Pennsylvania it has been held that the effects of a lodger and boarder are exempt from distress for rent due from the keeper of the boarding-house;² and that whenever a landlord knows or consents to the introduction of a stranger's goods upon the premises, as a consequence of the business acts of the tenant, such goods shall not be distrained.³ So in New York it was held that if a stranger's goods are on the demised premises without his fault, and he endeavors to regain them with due diligence and without any voluntary delay, they are not distrainable.⁴

§ 584. Distraint of Property of Strangers. — Observations. — The tendency of our decisions is, upon the whole, against the right of distraining goods not the property of the tenant; but it has been observed that to abrogate it altogether might lead to results not sufficiently adverted to.⁵ Independently of the fraud which might be perpetrated, and the delay that

¹ 4 Rand. 334; *Snyder v. Hitt*, 2 Dana, 204, 212; Elmer's (N. J.) Dig. 135; Rev. Laws of Illinois, 1833; Miss. Code, 1880, § 1317; and see *Patty v. Boyle*, 59 Miss. 491; *Paine v. Hotel Co.*, 60 *id.* 360.

² *Riddle v. Welden*, 5 Whart. 1; and see *Mathews v. Stone*, 1 Hill, 565. Such effects must be in his own use as a boarder. *Jones v. Goldbeck*, 14 Phila. 173.

³ *Brown v. Sims*, 17 S. & R. 138. A billiard-table rented by the month, and used in a saloon rented from a third party, is liable to distress for the rent of the saloon. *Price v. McAllister*, 3 Grant Pa. 248. Goods intrusted to an agent to be sold on commission are not liable to a distress for rent due from the agent. *Howe Sew. Mach. Co. v. Sloan*, 87 Pa. St. 438. But the property of a stranger found on the demised premises, and left there for no purposes of trade, or other purpose requiring protection, is liable. So a piano leased to the tenant's wife for her private use, prior to Act May 13, 1876. *Kleber v. Ward*, 88 *id.* 93. So the goods of one in possession under a lessee and holding over after the termination of the lease are liable to distress for rent accruing as well before as after the termination of the lease, unless the possession was under authority of the lessor. *Whiting v. Lake*, 91 *id.* 349.

⁴ *Gilbert v. Moody*, 17 Wend. 354.

⁵ *Connah v. Hale*, 23 Wend. 475.

would occur, were the tenant permitted to set up, as a defence to a distress for rent, property in a third person, the abolition of the right to distrain all goods on the premises not exempt at common law, would prevent the landlord from distraining the goods of an under-tenant, who, not being liable to him for rent in any form of action, by reason of a want of privity of estate or of contract, is a mere stranger to the landlord. And if the right of distraining the property of a stranger is refined away by judicial decisions, any lessee, by redemising the whole property which has passed to him under a lease, and reserving to himself but a single day of the original term as his reversion, may altogether defeat the right of distress. In fact, the principle laid down in the Pennsylvania case above referred to—that where the landlord knows or consents to the introduction of a stranger's goods on the premises as a consequence of the business acts of the tenant, such goods shall not be distrained—may well embrace the goods of an under-tenant, placed on the premises by the contract of the first lessee, with the consent, express or implied, of the landlord.

§ 585. Statutory Exemptions from Distress. — The statute laws of most of the States contain a variety of exemptions from distress, generally embracing the necessary tools of a mechanic, or for limited agricultural purposes.¹ Thus the statute of Alabama, of 1832, exempts two cows and calves, five hundred pounds of meat, one hundred bushels of corn, all books, a pair of working-oxen, all tools or implements of trade, twenty head of hogs, &c. The laws of Michigan exempt all private libraries not exceeding a hundred dollars in value. The statute of Georgia, of 1841, in favor of heads of families, exempts twenty acres of land, and an additional five acres for each child under fifteen years of age, provided the land derives its chief value from its adaptation to agricultural purposes. If the party owns more than twenty acres, he must procure that number of acres to be laid off, so as

¹ Acts of Maine, 1833, c. 307; State *v.* Haggard, 1 Humph. 390; Dailey *v.* May, 5 Mass. 313; Patten *v.* Smith, 4 Conn. 450; McDowell *v.* Shotwell, 2 Whart. 26.

to include the dwelling-house and improvements on the tract, not exceeding twelve hundred dollars in value; and this cannot be molested. He is also entitled to one horse, ten head of hogs, &c. So in Pennsylvania, by the act of 1849, property to the value of three hundred dollars, exclusive of all wearing-apparel of the tenant and his family, and all Bibles and school-books in use in the family, is exempted from distress as well as from levy and sale on execution. But the limits of our work do not permit us to go into all these statutory exemptions; and the details will appear more satisfactorily from a particular examination of the statutes themselves.

§ 586. Exemptions from Distress at Common Law.—There are, however, many *exceptions at common law* independently of the statutes, arising either from the circumstance that a distress was formerly considered as a mere pledge to the landlord for the payment of his rent, or from the care which the law takes that, while the interest of an individual is served, the common good of the public shall not be prejudiced. Thus things which cannot, with certainty, be identified, or which cannot be returned to the owner in as good a condition as at the time they were taken, are exempt. For it would be inconsistent with the notion of a mere pledge, that it could not be returned *in specie*; and it would be unjust to take such things as might be injured and lost to the lessee by the detention. For this reason, loose money, meal, or the like, not confined in a bag or sack, and, consequently, bearing no mark by which it may be known, cannot be distrained; but, when enclosed in a bag, which may itself be marked and known, and so identified, the objection ceases. The exception also extends to things of a perishable nature, such as fruit and milk;¹ to the necessary cooking utensils of any person who is a householder; and to the account-books of a merchant or shopkeeper.²

¹ Cooper *v.* Pollard, 1 Roll. Abr. 667, l. 16; Given *v.* Blann, 3 Blackf. 64; Morley *v.* Pincombe, 2 Exch. 101.

² Van Sickler *v.* Jacobs, 14 Johns. 434; Davis *v.* Arledge, 3 Hill (S.C.), 194.

§ 587. **Of Things in the Hands of Artificer or Merchant.**—Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ, have always been privileged for the sake of trade and commerce, which could not be carried on if such things, under these circumstances, could be distrained for rent due from the person in whose custody they are.¹ Therefore, things sent to places of trade, as a horse sent to a farrier's shop, cannot be distrained for the rent of the shop; nor yarn sent to a weaver's; nor cloth to a tailor's,² whether it be made up into garments or not; nor sacks of corn sent to a mill to be ground, or to a market to be sold.³ For the same reason, the goods of a principal, in the hands of a factor or consignee for sale, cannot be distrained for rent due from the factor;⁴ nor can goods consigned to a broker for sale, and placed by him for safe-keeping in a warehouse over the wharf at which they were landed, be distrained for rent due in respect of the wharf or warehouse.⁵ A horse sent to market with corn for sale is protected; or to a mill with corn to be ground, and remaining at the mill-door during the grinding; or cattle taken to be pastured for hire.⁶ So where a man sent a horse laden with yarn to a neighbor's to be weighed, whose landlord just then entered with a distress warrant, it was held that neither the horse nor the yarn was distrainable,—goods being privileged and protected under all such circumstances for the benefit of trade.⁷

¹ 1 Inst. 47, a; Wilson *v.* Duckett, 2 Mod. 61; Simpson *v.* Hartopp, Willes, 512. The lessor of a cotton-press has no lien or pledge, for the payment of his rent, on cotton sent there by third persons to be pressed. Rea *v.* Burt, 8 La. 509.

² Hoskins *v.* Paul, 4 Halst. 110; Wood *v.* Clarke, 1 Cr. & J. 484.

³ Co. Lit. 47, a. In Louisiana, the landlord has a privilege by way of pledge, on the tools of a tradesman found on the premises. Parker *v.* Starkweather, 19 Martin, 337.

⁴ Gilman *v.* Elton, 3 Brod. & B. 75; Brown *v.* Sims, 17 S. & R. 138; Himeley *v.* Wyatt, 1 Bay, 102; Matthias *v.* Mesnard, 2 Carr. & P. 353.

⁵ Thompson *v.* Mashiter, 1 Bing. 283; Swire *v.* Leach, 18 C. B. n. s. 479; Miles *v.* Furber, L. R. 8 Q. B. 77.

⁶ 2 Bac. Abr. Distress, B. Cadwalader *v.* Tindall, 20 Pa. St. 422.

⁷ Read *v.* Burley, Cro. El. 549. This exemption extends only to the goods of a stranger. Hoskins *v.* Paul, *supra*.

§ 588. Of Things brought on the Premises in ordinary Course of Business.—The exemption seems to be general in all cases where the course of business necessarily puts the tenant in temporary possession of the property of his customers.¹ Upon this principle, horses and carriages standing temporarily at an inn are privileged.² But if standing at livery, they are distrainable.³ In South Carolina, however, it has been held that a horse standing at a livery stable is not, for reasons of public policy, distrainable;⁴ nor, for the same reason, a negro boy bound out as an apprentice to learn a trade, accidentally found upon the premises.⁵ So, also, goods deposited in a warehouse for storage are not liable to distress; for the course of such business necessarily puts a tenant in possession of the property of his customers, and it would be against the dictates of conscience to allow the landlord to use him as a decoy, and pounce upon whatever should be brought within his grasp.⁶ Under the Massachusetts law of attachment upon *mesne* process, which is analogous to the common-law doctrine of distress for rent, it has been held that a stage-coach at a tavern, in preparation and nearly ready for departure, might be attached; and the court inclined to the opinion that steamboats, vessels, and stage-coaches in actual use, might also be attached.⁷

§ 589. Of Things delivered to a Common Carrier, Auctioneer, Manufacturer.—At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, are

¹ *Himeley v. Wyatt et al.*, 1 Bay, 102; *Walker v. Johnson*, 4 McCord, 552.

² *Co. Lit.* 47, 7. In Kentucky, goods in the tenant's possession, but which are under a *bonâ fide* mortgage to another person cannot be distrained. *Snyder v. Hitt*, 2 Dana, 204. An equity of redemption or any other limited interest of a tenant is distrainable, *Prewett v. Dobbs*, 21 Miss. 431.

³ *Francis v. Wyatt*, 3 Burr. 1498.

⁴ *Youngblood v. Lowry*, 2 McCord, 39.

⁵ *Phaelon v. McBride*, 1 Bay, 170.

⁶ *Brown v. Sims*, 17 S. & R. 138; *Walker v. Johnson*, 4 McCord, 552; *Miles v. Furber*, *supra*.

⁷ *Potter v. Hall*, 3 Pick. 368.

privileged;¹ so of goods on the premises of an auctioneer, deposited there for the purpose of sale;² or a beast sent to the premises of a butcher, to be slaughtered.³ But although materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from the weaver's rent, yet the frame or other machinery delivered by the manufacturer to the weaver, with the materials to be used in such manufacture, are not privileged unless there are other goods on the premises to satisfy the rent.⁴ On the same principle, a barge sent by a customer to the premises of a salt-manufacturer to be loaded with salt was not protected;⁵ nor a brewer's casks sent to a public-house with beer.⁶

§ 590. Exemption by Landlord's Consent. — Goods consigned for Sale. — If the landlord either expressly or impliedly consent that chattels placed by a stranger on the tenant's land shall be exempt from distress, he will be a trespasser if he afterwards distrains them.⁷ Goods deposited with another to await an opportunity to be sold, are not liable to distress or sale, for rent owing by the bailee.⁸ The law, in affording this protection, looks to the convenience of trade, and not to the business of the bailee, or to the particular character of the place where the goods are deposited,—as, whether it be a warehouse, wareroom, wharf, or other place of deposit. The clause in the statute exempting from distress, or sale for rent, goods which have been deposited with the keeper of any warehouse in the usual course of his business, is put merely by way of example, and not intended to limit the protection only to goods thus deposited. It was also said by Mr. Justice Park that this principle of exemption extends to every species of trade, not on account of the character of the individual in

¹ *Gisbourn v. Hurst*, 1 Salk. 250; *Read v. Burley*, *supra*.

² *Adams v. Grane*, 1 Cr. & M. 380; *Himeley v. Wyatt*, 1 Bay, 102.

³ *Brown v. Shevill*, 2 Ad. & E. 138.

⁴ *Wood v. Clarke*, 1 Tyrw. 314; *Fenton v. Logan*, 9 Bing. 676.

⁵ *Muspratt v. Gregory*, 1 M. & W. 633.

⁶ *Joule v. Jackson*, 7 M. & W. 450.

⁷ *Horsford v. Webster*, 5 Tyrw. 409.

⁸ *Connah v. Hale*, 23 Wend. 462.

whose hands they were deposited, but for the benefit of trade generally, which alone is to be considered, and for which only goods are by law to be favored and protected.¹

§ 591. Animals Feræ Naturæ. — As everything which is distrained is presumed to be the property of the occupant, things wherein a man can have no absolute and valuable property, cannot, for this reason, be distrained,—as deer, cats, rabbits, and all wild animals, which are *feræ naturæ*.² Yet, if such animals are kept in a private enclosure, for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they become distrainable.³ A dog may be valuable property, and is therefore distrainable.⁴ So, under the old regime, was the negro of a stranger, accidentally on the premises.⁵

§ 592. Fixtures not distrainable until severed from the Freehold. — Things affixed to the freehold, although belonging to the tenant, cannot be distrained so long as they remain affixed to the premises. But if they are permanently separated by the tenant or his agent, with a view of applying them to some other purpose,—in which case they would, in fact, no longer have the character of fixtures,—or with a view of removing them from the premises altogether, they become distrainable, although they may have passed into the hands of a *bond fide* mortgagee, who removed them in order to secure himself under his mortgage. For a mortgage of goods is not such a sale as will protect them from distress.⁶

§ 593. Goods sold generally not distrainable. — If a tenant quits possession at the end of his term, and sells his goods to

¹ *Mathias v. Mesnard*, 2 Carr. & P. 353. Thus neither raw material furnished by a third person to the tenant of a woollen factory, to be woven into flannel at a stipulated price per yard, nor the fabric when made, while on the premises, is subject to distress, being the property of the third party. *Knowles v. Pierce*, 5 Houst. 178.

² *Co. Lit.* 47, a.

³ *Davies v. Powell, Willes*, 50.

⁴ *Davies v. Powell, Willes*, 46, 48.

⁵ *Bull v. Horlbeck*, 1 Bay, 301.

⁶ *Vausse v. Russel*, 2 McCord, 329; *Cresson v. Stout*, 17 Johns. 116; *Reynolds v. Shuler*, 5 Cow. 323; *Darby v. Harris*, 1 Q. B. 895.

a succeeding tenant, they cannot be distrained for arrears of rent due by the former tenant.¹ And, as a general rule, goods which have been sold *bond fide* and for a valuable consideration before the seizure, are not distrainable unless they are suffered to remain an unreasonable time upon the premises after the sale.² And where goods of a tenant are sold under an execution, a reasonable time to remove them will be allowed to the purchaser; but there must be no unnecessary delay in the removal, otherwise they become distrainable. Therefore where they were sold on the afternoon of Saturday and distrained upon the following Tuesday, the distress was held good, because no reason was assigned for their remaining on the premises in the meantime.³

§ 594. Goods in Custody of the Law.— Goods in custody of the law, as a distress taken *damage feasant*, cannot be distrained;⁴ but in a case where the plaintiff in replevin was nonsuited, the avowant was allowed to distrain the same goods for rent since accrued, before the execution of the writ *de retorno habendo*.⁵ And when goods were seized by the sheriff under an attachment against an absconding debtor, the landlord's right of distress was held not to have been taken away.⁶ Where property is rightfully in the hands of a receiver, it is in custody of the court, and cannot be distrained upon without permission of the court by whom the receiver was appointed; and it is a contempt of court for a third person to attempt to deprive him of that possession in any manner whatever. But if the landlord has a claim upon such property for the recovery of rent, he may apply to the court for an order that the receiver pay the rent, or that the landlord be at liberty to proceed by distress or otherwise as he may be advised. If his claim is contested, the court will give him leave to go before a master, and be examined *pro interesse suo*.⁷

¹ Clifford *v.* Beems, 3 Watts, 246.

² Neale *v.* Clautice, 7 Har. & J. 372.

³ Gilbert *v.* Moody, 17 Wend. 354.

⁴ Co. Lit. 47, b.

⁵ Hefford *v.* Alger, 1 Taunt. 218.

⁶ Acker *v.* Witherell, 4 Hill, 112.

⁷ Noe *v.* Gibson, 7 Paige, 513; Matter of Hopper, 5 *id.* 489; 2 Story, Eq. Jur. 177; Martin *v.* Black, 9 Paige, 641.

§ 595. In hands of Officers of Court.—Of Boarder in Boarding-house. — The same principles are applicable to every interference with the possession of a sequestrator, committee, or custodian, who holds the property as an officer of the court,—as his possession is in law the possession of the court itself; and in all such cases application must be made to the court for an order for the payment of the amount due.¹ Therefore, where in a suit on a judgment creditor's bill a receiver of the defendant's property was appointed and received an assignment thereof, and after the next quarterly rent became due, removed personal property from the premises, it was held that it was too late for the landlord to exercise his right to distrain. If, however, the receiver had previously accepted the term, he would have taken it *cum onere*, and as tenant of the premises been liable for a removal of the furniture, as a removal of tenant's goods within the meaning of the statute.² Property in a boarding-house, though belonging to a boarder, is not exempt if it be in actual possession and use of the tenant, by consent of the boarder, without the landlord's permission.³ But it has been held in Pennsylvania that the goods of a boarder were not liable to distress for the rent of the house, on the ground that chattels so situated are within the reason of the law which protects the property of a stranger tarrying at an inn from being distrained for rent due on account of the premises. And the principle was said to be a growing one, and that it ought to embrace every case that could at all be brought within it.⁴

§ 596. Of Foreign Ambassadors and Ministers.—Things in actual Use. — The houses of ambassadors or other public ministers of a foreign prince or State, and of their domestic servants, are, by the law of nations, inaccessible to the ordinary officers of justice,—being considered out of the jurisdiction of the country; their goods are, therefore, for reasons of public policy, privileged from distress.⁵ Such things as are

¹ *Id.*; Jacob's Ch. 572; *Lees v. Warring*, 1 Hogan, 216; *Everett v. Neff*, 28 Md. 176.

² *Martin v. Black*, *supra*.

³ *Matthews v. Stone*, 1 Hill, 565.

⁴ *Riddle v. Welden*, 5 Whart. 9.

⁵ *Vattel*, book iv. ch. 9; *Hopkins v. De Robeck*, 3 T. R. 80.

in actual use are protected from distress,—as, the hatchet with which a man is working, the clothes he is wearing,¹ or the horse he is riding;² which exemption, it is said, arises from the anxiety with which the law guards against any incitement to a breach of the peace. A cart loaded with grain is therefore said to be privileged if a man be upon it;³ and a stocking-frame,⁴ or a weaver's loom, cannot be distrained while a person is employed upon it.⁵

§ 597. Beasts of the Plough; Sheep; Implements of Trade.—

Cattle of Stranger.—Nor will the common law permit beasts of the plough, sheep, and the implements of a mechanic's trade, to be distrained for rent, until other chattels sufficient for the demand cannot be found. But with respect to things thus conditionally privileged, it has been held that, even though there be a sufficient distress besides upon the premises, yet if that distress consist of growing crops, which are only distrainable by statute, and not immediately productive, the landlord is not bound to avail himself of it, but may distrain the things privileged *sub modo*.⁶ And if a landlord distrains, among other things, his tenant's cattle and beasts of the plough, and it turns out after the sale that there would, in point of fact, have been sufficient to satisfy the rent and expenses without taking them, such distress is not thereby proved to be illegal, if there were reasonable grounds for supposing (judging from the appraisement) that without taking beasts of the plough, there would not have been sufficient to have satisfied the rent and expenses when sold.⁷ Cattle belonging to a stranger, though in general liable to be taken if found upon the premises,⁸ are not so under particular circumstances,—as, if they

¹ Co. Lit. 47, a.

² Storey *v.* Robinson, 6 T. R. 138.

³ Welch *v.* Bell, 1 Vent. 36.

⁴ Simpson *v.* Hartopp, Willes, 512.

⁵ Gorton *v.* Falkner, 4 T. R. 565. The instruments of a man's trade or profession are not absolutely exempt from distress, but only in case of their being in actual use, or when there is a sufficiency of other goods on the premises to meet it. Trieber *v.* Knabe, 12 Md. 491.

⁶ Piggott *v.* Birtles, 1 M. & W. 441.

⁷ Jenner *v.* Yoiland, 6 Price, 3. ⁸ Read *v.* Burley, Cro. El. 549.

are put upon the land by the owner for necessary refreshment while on their way to market.¹

§ 598. Goods in Execution; Landlord's Statutory Remedy against. — Goods of the tenant taken in execution, though remaining on the premises, cannot be distrained, because they are in the custody of the law;² and by common law the landlord lost his lien upon the tenant's goods after the sheriff had levied on them; for an execution took precedence of all debts, except specific liens.³ But the statute of 8 Anne, c. 14, provided a remedy for a landlord to whom rent is due under these circumstances, by directing the sheriff to pay him, not exceeding a year's rent, out of the proceeds of the property seized on the premises by the execution.⁴ No particular form of notice was required to be given to the sheriff under this statute; the only inquiry for him to make was whether rent was in fact due. Of this he was bound to inform himself, and was liable to the landlord for removing the goods from the demised premises without satisfying the year's rent.⁵ The Revised Statutes of New York — which, however, as we observed, have abolished this whole proceeding of giving a preference to an execution creditor for the collection of his rent — required that a written notice, with a verification in a certain form, should be served upon the sheriff; and it was not in the power of the officer holding the execution to dispense with either, for being a summary power given by the statute, it must be strictly pursued.⁶

¹ Poole *v.* Longuevill, 2 Wms. Saund. 290, n. (7).

² Rex *v.* Cotton, Park, 120; Eaton *v.* Southby, Willes, 136; Hamilton *v.* Reedy, 3 McCord, 40.

³ Co. Lit. 47, b; Henchett *v.* Kimpson, 2 Wils. 140.

⁴ But this statute applies only to existing tenancies, and the sheriff so levying is not responsible for the rent on a demise which has terminated, though less than six months before. Cox *v.* Leigh, L. R. 9 Q. B. 333.

⁵ Andrews *v.* Dixon, 3 B. & A. 645; Olcott *v.* Fraser, 5 Hill, 562; Farrington *v.* Bailey, 21 Wend. 65. And this applied to rent due by virtue of a contract to pay in advance, as well as to rent which had become due by actual occupancy. Peters *v.* Newkirk, 6 Cow. 103.

⁶ Frisbey *v.* Thayer, 25 Wend. 396. This notice must state distinctly the tenant's name, amount due, and all other particulars required by the statute. Millard *v.* Robinson, 4 Hill, 604.

§ 599. **Attaches only to Goods on the Premises.** — The statute refers only to goods upon the premises, and does not extend to chattels real; which may, therefore, be taken and sold to satisfy the execution, without any reference to the landlord's claim for rent.¹ Should there be a year's rent due to the landlord at the time of levying the execution, and he omits to give notice to the officer of his claim until after the accruing of another year's rent, he is entitled to only one year's rent; although, subsequent to the accruing of the second year's rent, new executions are levied upon the property by another officer, and notice of rent due is given to him by the landlord. Yet if he has given notice of his claim on the levy of the first execution, and gives a like notice on the levy of the second, he may be entitled to two years' rent.² If the goods are taken in execution after the distress is levied, the landlord may go on and complete his distress, and also claim the accruing year's rent in preference to the execution creditor.³

§ 600. **Contemplates an existing Tenancy.** — The statute contemplates only a tenancy existing at the time of levying the execution; where, therefore, a sheriff seized goods under a writ of *fieri facias*, and a writ of *habere facias possessionem* was subsequently delivered to him in an ejectment, at the suit of the landlord, on a demise made previous to the *fi. fa.*, — it was held that the sheriff was not justified in allowing a year's rent to the landlord, as the tenancy must have ceased on the demise in the ejectment.⁴ Nor will an agreement between a purchaser and vendor of real estate, where the consideration-money is to be paid in instalments, and the purchaser enters into possession, that the vendor may collect the moneys as they become due by *distress or otherwise*, as for so much rent due, entitle the vendor to a preference over judgment creditors, as landlord of the demised premises, in case of a sale of the purchaser's property under execution, and notice given

¹ *Hamilton v. Reedy*, 3 McCord, 38.

² *Van Rensselaer v. Quackenboss*, 17 Wend. 34.

³ *Biddle v. Biddle*, 3 Harringt. 539.

⁴ *Hodgson v. Gascoine*, 5 B. & A. 88.

by the vendor, claiming the amount due on the contract *as rent.*¹

§ 601. Goods of Strangers.—Execution is for accrued Rent only.—It is not material whether the goods seized under the execution belong to the tenant or to a third person; if they are upon the premises at the time of the seizure they are liable for a year's rent, and cannot be taken away by the sheriff upon an execution, without paying the landlord the rent due him at the time of levying the execution.² The landlord's lien, however, extends only to rent due previous to a levy made by the sheriff on the execution, and not for rent subsequently accruing while the goods remain on the premises in the possession of the sheriff.³ Nor is he entitled to the rent of the whole current year, but only to the amount due on the last quarter-day.⁴ And though there be several executions, he can claim no more than one year's rent;⁵ but this he is entitled to without any deduction for sheriff's poundage,⁶ although the sheriff may deduct such costs as were incurred before he received notice from the landlord.⁷

§ 602. Statute for Benefit of Immediate Landlord only.—No one but the immediate landlord may avail himself of this provision of the statute, for the ground landlord cannot claim a year's rent upon an execution against the under-tenant;⁸ nor is a sheriff liable to the landlord for removing the goods of such a tenant from the demised premises, leaving the rent unpaid.⁹ And the statute only applies to cases where a judg-

¹ *Sackett v. Barnum*, 22 Wend. 605.

² *Spencer v. McGowan*, 13 Wend. 256. If the lease be of premises, with a right of way or passage appurtenant, a distress cannot be made of goods which are in the passageway. *Winslow v. Henry*, 5 Hill, 481.

³ *Trappan v. Morie*, 18 Johns. 1; *Hoskins v. Knight*, 1 M. & S. 245. Rent is not *per se* a lien on goods found on the premises; it only becomes so when seized under a distress. *Buckey v. Snouffer*, 10 Md. 149.

⁴ *Hazard v. Raymond*, 2 Johns. 478.

⁵ *Russell v. Doty*, 4 Cow. 576; *West v. Sink*, 2 Yeates, 274.

⁶ *Colyer v. Speer*, 2 Br. & B. 67.

⁷ *Henchett v. Kimpson*, 2 Wils. 140.

⁸ *Ex parte Bennet*, Stra. 787.

⁹ *Brown v. Fay*, 6 Wend. 392.

ment creditor claims adversely to the landlord, and not where the execution is sued out by the landlord himself. It was intended to protect a landlord against frauds which might be committed upon him by his tenant, — particularly by his colluding with creditors to issue executions upon his goods. For when his property had thus been placed in legal custody by an execution, and so could not be distrained, a judgment creditor, by keeping possession of it for a length of time, might seriously affect the interests of the landlord. The statute, therefore, only protects landlords against executions issued by third persons, and not by the landlord himself.¹

§ 603. Form of the Statutory Proceeding. — To compel the sheriff to pay over the year's rent, the landlord or his executor may move the court out of which the execution issued that he be paid the amount due to him out of the money produced by the levy, if it be sufficient for that purpose, and if not sufficient, then that it be paid to him on account of his rent, so far as it will satisfy the same.² And this motion may be made at any time before the sheriff has actually paid over the proceeds to the plaintiff in the execution ; he being bound, upon receipt of the landlord's notice, to retain a year's rent out of the proceeds of the tenant's goods.³ The landlord may also have a special action on the case, for the sheriff's neglect to pay over such rent ; for taking goods after receiving the landlord's notice, without leaving a year's rent on the premises ;⁴ or for remaining upon the premises an unreasonable length of time.⁵ And if, on receiving notice, he finds the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw.⁶ But in order to recover against a sheriff, there must be an averment and proof of loss or damage sustained by the plain-

¹ *Taylor v. Lanyon*, 6 Bing. 536; *Camp v. McCormick*, 1 Den. 641.

² *Henchett v. Kimpson*, 2 Wils. 140; *Colyer v. Speer*, *supra*.

³ *Arnitt v. Garnett*, 3 B. & A. 440.

⁴ *Leery v. Godson*, 4 T. R. 687; *Duck v. Braddyll*, McLel. 217; per Ld. Denman, in *Ladd v. Thomas*, 12 Ad. & E. 117.

⁵ *Winterbourne v. Morgan*, 2 Camp. 117; *Hoskins v. Knight*, 1 M. & S. 247.

⁶ *Foster v. Hilton*, 1 Dowl. P. C. 35; *Calvert v. Joliffe*, 2 B. & Ad. 418; *Brown v. Jarvis*, 5 Dowl. P. C. 281.

tiff, in consequence of the neglect complained of, at least to the extent of being delayed or prejudiced in some way.¹ No action for money had and received to the landlord's use can be maintained for the amount of a year's rent.²

§ 604. Liability of the Officer under the Statute. — In an action against the sheriff for removing goods taken in execution without paying the landlord a year's rent, it is not necessary to prove that the year's rent is due; it is sufficient to show an occupation by the tenant; and it then lies on the defendant to show that the rent has been paid. Such a claim may be supported for rent stipulated to be paid in advance; and may be distrained for by the landlord, although he is aware that an execution is about to be issued by a judgment creditor.³ If goods have been once removed under the execution, and the landlord has notified the sheriff to pay him a year's rent, they cannot be afterwards released and the execution withdrawn, without paying the landlord; because, while they were in the custody of the law, the landlord could not distrain them.⁴ The sheriff's liability attaches if he removes any of the goods without retaining the rent; for the landlord cannot be called upon to show that the property remaining on the premises was not sufficient to satisfy his claim.⁵ But if upon the goods of a tenant being taken in execution an agent of the landlord takes from the sheriff's officer an undertaking for a year's rent, and then consents to the goods being sold, the landlord cannot afterwards maintain this action against the sheriff, although the rent is not paid according to the undertaking, and although the agreement is void under the statute of frauds, for not stating a consideration.⁶ After a

¹ *Dyke v. Duke*, 4 Bing. N. C. 197; *Dean of Hereford v. Macnamara*, 5 D. & R. 95; *Beckford v. Montague*, 2 Esp. 475.

² *Green v. Austen*, 3 Camp. 260.

³ *Harrison v. Barry*, 7 Price, 690. ⁴ *Lane v. Crockett*, 7 Price, 566.

⁵ *Colyer v. Speer*, 2 Br. & B. 67; *Calvert v. Joliffe*, *supra*. The cases proceed on the analogy to the action on the case, which lies against the sheriff for neglect or wrongful conduct in conducting the sale of goods under a *fi. fa.*, by which they are sold much under their value. *Phillips v. Bacon*, 9 East, 298.

⁶ *Rotherey v. Wood*, 3 Camp. 24.

sale under the execution, the goods are no longer in legal custody, and may, if they remain on the premises, be distrained by the landlord, notwithstanding the sale; therefore, standing crops, though protected after the sale until they are cut and a reasonable time has elapsed for their removal, if suffered to remain after such reasonable time has elapsed, cease to be protected, and become distrainable.¹

§ 605. Landlord's Duty in respect of Goods distrained. — Formerly, as soon as a landlord distrained goods or chattels for rent, he was obliged to remove them elsewhere, unless he had the consent of the tenant to impound them on the premises. If he kept them on the premises he rendered himself liable to an action of trespass.² But to obviate the inconvenience which might frequently arise by enforcing this rule, the statutes provide that *the distress may be impounded* in any convenient part of the land chargeable with rent. And this is the practice in Pennsylvania, although the clause of the statute 11 Geo. II. which gives this power is not contained in the act of the assembly.³ At common law, beasts might be put in a public pound at the charge of the owner, but if they were kept in a private pound the distrainor was bound to keep them at his peril, with provision at his own cost; and if they died for want of sustenance, the distrainor was liable. Household goods, and other chattels which might receive damage from the weather, were also to be put into a pound *covert*, otherwise the distrainor was held to be answerable if they were damaged or stolen.

§ 606. Goods in charge of Pound-Keeper. — A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not. If the cattle were wrongfully taken, the person who brought the cattle is answerable, and not the pound-keeper, unless he assented to the trespass. When the cattle are once

¹ Peacock v. Purvis, 2 Br. & B. 362.

² 9 Vin. Abr. Distress, E. 4; Winterbourne v. Morgan, 11 East, 395; Wallace v. King, 1 H. Bl. 13.

³ Woglam v. Cowperthwaite, 2 Dall. 68.

impounded, he cannot let them go without a replevin or the consent of the party, for they are then in custody of the law; but if the pound is broken, the pound-keeper cannot bring an action, nor any one else except the person who distrained them.¹ At common law, if any person, whether owner or not of any cattle that had been distrained and put into the common pound or any other lawful pound, took them out and drove them away, he was liable to an action of *pound breach* at the suit of the landlord;² or if, being in possession of a distress which he was desirous of impounding, another person rescued it before it was actually impounded, an action on the case might be maintained for the disturbance.³ The tenant, however, may lawfully rescue his goods before they are impounded, if the landlord seizes them unlawfully, as where there is no rent in arrear; or if, though due, he tenders the rent. So, also, if the landlord takes goods privileged by law, as things protected for the sake of trade, or beasts of the plough, while other things remain on the premises sufficient to satisfy the distress. And a stranger may rescue his goods if taken without cause.⁴

§ 607. Tenant to have Notice in order to Redeem. — After the goods have been seized, the tenant must at once be notified of it, and an opportunity afforded him to redeem them. The statute provides that whenever any goods or chattels shall be distrained for rent, the officer making the distress shall immediately give notice thereof, with the cause of such distress, the amount of rent due, and an inventory of the articles taken, by leaving the same with the tenant, or, in case of his absence, at the chief mansion-house, or at some other notorious place on the demised premises. And if a sale is made without giving such notice, the landlord has been held in Pennsylvania to be a trespasser *ab initio*.⁵

¹ *Badkin v. Powell*, Cowp. 476; *Brandling v. Kent*, 1 T. R. 62.

² F. N. B., 100, b. ³ F. N. B., 101, a; 102, b.

⁴ 2 R. S. 503, § 23; 2 W. & M. 1, c. 5; Co. Lit. 160, b.

⁵ *Kerr v. Sharp*, 14 S. & R. 402. In Illinois there must also be an appraisement of the property taken, in order to authorize a sale. *Curtis v. Bradley*, 75 Ill. 180. In Maryland, a notice of the distress, posted on

§ 608. **Landlord not to use distrained Property, generally.**—A distress when taken cannot be worked or used for any purpose, because the distrainor has only the custody of the thing as a pledge;¹ but a cow may, and, indeed, ought to be milked, except where she is put into a pound to which the owner has access, that he may milk her himself.² It is said, however, that if a landlord distrains raw cloth, he may cause it to be fulled; but that hides cannot be tanned, because the tanning will prevent the tenant from recognizing his property.³ If an injury happens to the distress in consequence of any act of the landlord, however well intended, he must answer for it to the tenant; therefore where a horse had several times escaped from the pound, and the landlord for greater security tied him to a stake in the pound, and the horse strangled himself with the rope, the landlord had to pay his full value; for the law insists upon the landlord's keeping the distress sacred,—for the reason that it is a mere pledge in his hands to secure the payment of his rent.⁴

§ 609. **Property may be sold.—Appraisal and Notice.**—Upon the same principle, he was formerly, under the old law, forbidden to sell or dispose of the distress after he had taken it into his possession, for the purpose of reimbursing himself, and was obliged to hold it until the tenant thought proper to redeem it; his security was not therefore available to him before the tenant chose to make it so.⁵ But the statute 2 William and Mary, c. 5, first authorized the sale of the property distrained, and made the proceeding by distress a speedy remedy for the non-payment of rent. It provided that if at the expiration of five days from the day of the service of such notice, the amount of the rent due, together with the cost of the distress, shall not be paid, and the goods distrained shall not be replevied according to law, the officer making

the premises and advertised in a daily newspaper answers the requirements of the statute. Cahill v. Lee, 55 Md. 319.

¹ Chamberlayn's Case, 1 Leon. 220.

² Bagshawe v. Goward, Cro. Jac. 148.

³ Duncomb v. Reeve, Cro. El. 783.

⁴ 1 Roll. Abr. 673, l. 26.

⁵ Pledall v. Knapp, 1 Anders. 65.

such distress shall summon two disinterested householders, who shall be sworn by such officer, well, truly, and impartially, to appraise the goods and chattels so distrained, according to the best of their understanding; and the said appraisers shall thereupon appraise the goods and chattels so distrained, and shall state the same in writing under their hands.¹ Of the five days mentioned in the statute, the first of them is to be taken as exclusive, and the last inclusive; thus, for instance, if the seizure be made on Monday, the notice must be given the same day to expire on Saturday.² But in Pennsylvania it is reckoned exclusive of the day of distress; and if Sunday be the last of the five days, it is not to be counted.³ The appraisers must be persons having no interest, either as agent or party distraining, and must be sworn before the appraisement is made.⁴ The officer conducting the proceedings must be present at the appraisement, and is the only person authorized to administer the oath; and the proceedings will be irregular if the appraisers are sworn before the sheriff of an adjoining county or the constable of a neighboring town.⁵

§ 610. Sale to be made within Reasonable Time. — Application of Proceeds. — After the five days' notice to the tenant of the distress, and another five days' notice of sale shall have expired, if the rent and charges remain unpaid, and the goods shall not have been replevied, the officer will proceed to sell them for the best price he can obtain for them; applying the proceeds of sales to the payment of rent and charges, and the balance, if any, as directed by the statute.⁶ The landlord is

¹ The statute intends by "two sworn appraisers" two competent persons, not necessarily professional appraisers. *Cahill v. Lee*, 55 Md. 319.

² *Wallace v. King*, 1 H. Bl. 13.

³ *McKinney v. Reader*, 6 Watts, 34.

⁴ *Lyon v. Weldon*, 2 Bing. 334.

⁵ *Kenney v. May*, 1 Mood. & R. 56.

⁶ The landlord being bound to obtain the "best price," cannot annex to the sale a condition as to the mode of using the distrained property; although a like condition was contained in the lease. *Hawkins v. Walbond*, 1 L. R. C. P. Div. 280. The burden is on the party claiming goods sold upon distress to show that all the statutory requirements of

not bound to sell immediately upon the expiration of the five days, but is allowed a reasonable time afterwards for the appraisement and sale.¹ If, however, he gives the tenant further time for the payment of rent, and suffers the goods to remain on the premises, it will be prudent to procure the written consent of the tenant to the landlord's keeping possession of the goods upon the premises for the further time thus given. No delay in proceeding to a sale of the property distrained will destroy the lien for rent, nor vitiate the proceedings, where there is no evidence of collusion between the landlord and tenant.² And, as a reasonable time will be allowed for selling, the distrained goods are during such time in custody of the law, and protected from seizure under an execution.³ If the papers upon which the distress was made should be lost, and the sale takes place without them, the purchaser will, nevertheless, acquire a good title, and the authority may be established by secondary evidence.³

§ 611. Penalty for Clandestine or Fraudulent Removal of Goods.—To prevent the landlord from being deprived of his distress by a clandestine and fraudulent removal of the tenant's goods from the premises, it is generally enacted that any tenant or lessee who shall remove his goods from the demised premises, either before or after any rent shall become due, for the purpose of avoiding the payment of such rent, and every person who shall knowingly assist the tenant or lessee in such removal, or in concealing any goods so removed, shall forfeit to the landlord of the demised premises, his heirs or assigns, double the value of the goods so removed or concealed. This section authorizing the landlord to seize any goods which have been removed from the premises, and such a sale have been complied with; and it is held that the presumption that an officer has done his duty is not applicable to the case of a constable making such a sale,—he acting therein as an agent of the landlord and not as an officer of the law. *Murphy v. Chase*, 103 Pa. St. 260.

¹ *Pitt v. Shew*, 4 B. & A. 208.

² *Bac. Abr. Execution*, C. 4; *Harrison v. Barry*, 7 Price, 690. But after a distress and before a sale the landlord cannot sue for the rent. *Lehain v. Philpott*, L. R. 10 Exch. 242.

³ *Peck v. Gurney*, 2 Hill, 605.

imposing a penalty on the tenant and others, removing or concealing them for the purpose of defrauding the landlord, applies only to the removal of goods that belong to the tenant, and not to those of a stranger which may happen to be upon the premises, although they may be liable to a distress.¹ The statute, however, contemplates physical aid and assistance, directly or indirectly, in the removal or concealment of the goods, and not mere advisory aid. Nor will the removal or concealment of part of the goods subject the party to the penalty of removing or concealing the whole. And where a tenant is in possession of goods, the law will intend that he is the owner; and the burden of proof to the contrary lies upon him who has removed them to avoid the distress.²

§ 612. Aiding Fraudulent Removal or Concealment. — If a man's servants, or any person in his employ, by his direction, or with his knowledge and assent, assist in the removal of the tenant's goods, it will render the principal liable; or if the goods are removed to his house, and received and concealed by him, he knowing the object and circumstances of the removal, this will bring him within the statute; but the mere advising the removal of the goods will not subject him to the penalty of the statute.³ And although the tenant may sell or mortgage his fixtures, yet if he does mortgage them, and the mortgagee takes possession and removes them, after they have become liable for the rent, the landlord may follow and distrain them within thirty days thereafter; but the mortgagee will not, by such removal, subject himself to the penalty imposed by the statute for a fraudulent removal.⁴ In an action

¹ *Coles v. Marquand*, 2 Hill, 447; *Slocum v. Clark*, *id.* 475; *Thornton v. Adams*, 5 M. & S. 38; 11 Geo. II. c. 19.

² *Strong v. Stebbins*, 5 Cow. 210.

³ *Lister v. Brown*, 3 Dowl. & R. 501.

⁴ *Reynolds v. Shuler*, 5 Cow. 323. In *Grace v. Shively*, 12 S. & R. 217, it was held that the statute of Pennsylvania did not apply to cases where the goods were removed before the rent became due. The legislature, on March 25, 1825, thereupon passed an act confined in its operation to the city and county of Philadelphia, by which the landlord is enabled, even before his rent is due, to distrain for it, when the tenant shall fraudulently carry away from the demised premises his goods or chattels, with intent

for the penalty for assisting a tenant in concealing goods removed from the demised premises, a person who deters a bailiff from taking the property by falsely denying the tenant to be the owner thereof, alleging a third person to be the owner, subjects himself to the same penalty.¹ But where a creditor took the goods of his debtor, and removed them from the premises by the debtor's assent, in payment of a debt, apprehensive of the landlord's distraining, the court held there was nothing in the transaction which was in contravention of the statute.² And where the action is for aiding and assisting the tenant in the fraudulent removal of his goods with intent to prevent the landlord from distraining, it must be proved, not only that the defendant assisted the tenant in such fraudulent removal, but was also privy to the fraudulent intent of the tenant; for as to suits against third persons under this section the statute is penal, and requires strict proof to bring the case within the statute.³

§ 613. Landlord Trespasser ab initio at Common Law, when.

— At common law, if an entry or authority is given to any one by law and he abuses it, he is to be considered a trespasser from the beginning; his original entry, and every act done in pursuance of it, is viewed as if the law had given him no authority whatever to enter;⁴ but if he abuses an authority given him *by the party*, he is not to be held as a trespasser *ab initio*.⁵ The reason assigned for this distinction is that where a general authority or license is given by law, the law judges of a man's previous intentions by his subsequent acts; but where the party himself gives an authority, he cannot, for any subsequent cause, convert that which was originally done under his sanction into a trespass *ab initio*; in this latter case, to defraud the lessor of his remedy by distress. And in such case the landlord may consider his rent as apportioned to the time of the carrying away of the goods, and distrain the goods within thirty days, wherever they may be found.

¹ Crafts *v.* Plumb, 11 Wend. 143. ² Bach *v.* Meats, 5 M. & S. 200.

³ Brooke *v.* Noakes, 8 B. & C. 537.

⁴ Six Carpenters' Case, 8 Co. 146; Van Brunt *v.* Schenck, 13 Johns. 414; Allen *v.* Crofoot, 5 Wend. 506.

⁵ *Id.*; Esty *v.* Wilmot, 15 Gray, 168.

therefore, only the subsequent acts will amount to a trespass. Thus, the law gives authority to enter upon land to distrain, but if the distrainor works or kills the distress, or commits any irregularity, the law adjudges that the party entered for the specific purpose of committing the particular injury; and because the act which demonstrates the intention is a trespass, he is adjudged a trespasser *ab initio*. One of the consequences of this doctrine was that if a landlord committed the least irregularity in distraining for rent, he was considered a *tort-feasor* throughout, and answerable to the tenant for the value of the goods distrained. And if any of the acts of his agent were without the prerequisites appointed by law,—as, if cattle were impounded without previous appraisement, or goods taken under a warrant of distress for rent were sold without appraisement and advertisement,—where, as in Pennsylvania, the statute of 11 Geo. II. c. 19 is not in force,—the landlord became a trespasser *ab initio*.¹

§ 614. Rule changed by Statute.—As this doctrine, however, was found to bear hard upon landlords, it is now provided by statute that when a distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent, the distress shall not therefore be deemed unlawful, nor the party making it a trespasser from the beginning; but the party aggrieved may maintain an action of trespass, or of trespass on the case, and recover satisfaction for the special damages he may have sustained by such irregularity, with costs.² If, therefore, a land-

¹ *Sackrider v. McDonald*, 10 Johns. 253; *Purrington v. Loring*, 7 Mass. 388; *Kerr v. Sharp*, 14 S. & R. 399; *Waddell v. Cook*, 2 Hill, 47; *Oxley v. Watts*, 1 T. R. 12; *Aitkenhead v. Blades*, 5 Taunt. 198. But where the landlord made a lawful and regular distress, and on the fifth day thereafter the appraisement was made and the goods advertised for sale, it was held that the landlord and his bailiff did not become trespassers *ab initio* by reason of the premature appraisement, and although a subsequent sale would have been illegal and they would thereby have become trespassers. *McLean v. McCaffrey*, 3 Penny. (Pa.) 406. It was held in *Dow v. Blake*, 15 Bradw. (Ill.) 89, that delivery of a distress warrant does not render the landlord liable for the unauthorized and unapproved acts of the bailiff or his assistants.

² 2 N. Y. R. S. 505, § 28; 11 Geo. II. c. 19, § 19. *Semble* that in such

lord commences his proceedings right, but should afterwards carry them on wrong, he is only chargeable as a trespasser from the time when the wrong commenced, and not from the original taking of the goods; and all the injured party can recover is the actual damage he has sustained in consequence of the irregularity.¹ The nature of the irregularity, and the peculiar circumstances of the case, must determine whether the proper form of action is trespass or case. We shall have occasion to discuss this subject more fully when we come to the action of trespass; but, as a recent illustration of the statute, we will here mention that where a landlord distrained for rent, among other things, some goods which were not legally distrainable, he was held to be a trespasser only as to those particular goods.²

SECTION II.

THE ACTION OF DEBT FOR RENT.

§ 615. **Remedy to recover Rent, as such, with Interest.**—The action of debt is another remedy which the landlord has for the recovery of rent. The action is so called because it is in legal consideration for the recovery of a debt *eo nomine* and *in numero*; and though damages are in general awarded for the detention of the debt, yet in most instances they are merely nominal, and not, as in *assumpsit* and covenant, the principal object of the suit. By it every kind of rent is recoverable, whether the contract of demise be by deed or by parol; and whether it is payable in money, corn, or other produce of the land reserved by the lease. In the latter case, the

an action the landlord may recoup to the extent of the rent unpaid, though not due. See *Cunnea v. Williams*, 11 Bradw. (Ill.) 72; § 374, *ante*.

¹ *Winterbourne v. Morgan*, 11 East, 395. But the rule of the common law seems still to obtain in Maryland, and when the trespass is *ab initio* the measure of damages will be the entire value of the goods. *Cate v. Schaum*, 51 Md. 299.

² *Harvey v. Pocock*, 11 M. & W. 740.

plaintiff recovers, not the produce itself, but its value in money at the time the rent becomes payable. In addition to the debt, he recovers, also, interest on the rent from the time it was due, as damages for its detention; and if payable in wheat or other produce, he is entitled to interest on the value of such produce, if it was not delivered on the day stipulated.¹

§ 616. To maintain, Rent due must be Ascertainable.—This action is not maintainable in any case unless the demand be for a sum certain, or for a pecuniary demand which can readily be reduced to a certainty. In some cases it is the *peculiar* remedy,—as, against a lessee for an apportionment of rent, upon his eviction from part of the premises by a third person, though covenant may in such cases be sustained against the assignee of the lessee.² It is also the only remedy against a devisee of land for a breach of covenant by the devisor.³ It is the appropriate remedy at common law for the lessor, or his assignee, against the assignee of a term of years.⁴ If the lessee assigns part of the estate, debt lies against him and his assignee jointly, or against each for the parcel held by him.⁵ But the plaintiff must show that the assignee is assignee of part only, and must not declare against him as assignee of the whole, nor, as it would seem, for the whole rent.⁶

§ 617. May be maintained upon a Lease.—Debt lies for rent upon a lease, although the defendant entered before his title began; for though he is clearly a disseisor by his entry, and the accruing of the term does not alter his estate, yet debt

¹ Demy *v.* Parnell, 1 Roll. Abr. 591, l. 28; Cheney's Case, 3 Leon. 260; 4 *id.* 46; Van Rensselaer *v.* Jewett, 5 Den. 135.

² Stevenson *v.* Lambard, 2 East, 579; Devereux *v.* Barlow, 2 Saund. 182. Rent does not accrue to a lessor as a debt until the lessee has enjoyed the use of the land. Bordman *v.* Osborn, 23 Pick. 295.

³ Doe *v.* Vernon, 7 East, 8.

⁴ Thursby *v.* Plant, 1 Wms. Saund. 241, b; Allen *v.* Bryan, 5 B. & C. 512.

⁵ Walker's Case, 3 Co. 23; Auriol *v.* Mills, 1 H. Bl. 433.

⁶ Curtis *v.* Spitty, 1 Bing. N. C. 759; Hare *v.* Cator, Cowp. 766.

lies upon the privity of contract; and whether the entry be tortious or not, cannot discharge the contractor from payment of rent.¹ If a lessee for years assign over his term, reserving rent, he may maintain debt for the rent in arrear, although he has no reversion.² And where the tenancy was yearly and by parol, the assignee of the reversion could only recover rent where the enjoyment was had and the arrears accrued before the assignment to him, in an action of debt on the parol demise, and not in an action of debt for use and occupation.³

§ 618. So, after Entry for Forfeiture, for Rent accrued. — The landlord, after he has entered for a forfeiture of a lease, may recover the rent which accrued previous to such forfeiture, in this action or upon the covenants in the lease. But for rent which became due subsequent to that time he cannot recover as landlord; and his only remedy is to proceed for the mesne profits in an action of ejectment against the lessee or the person who has held the possession of the premises adversely to his claim.⁴ As to a lease made by tenants in common, it is settled that the survivor may sue for the whole rent, although the reservation be to the lessors according to their respective interests; for it is a well-known rule that an action for rent by tenants in common is in its nature a joint action, and consequently the survivor may sue for the whole.⁵

§ 619. At Common law, not maintainable before Determination of Freehold Lease. — This action lay at common law for the rent of lands demised either for life, for years, or at will,⁶ — with the distinction, however, that upon a lease for years, or at will, it lay as soon as rent became in arrear; but on a freehold lease debt could not be maintained until after the lease was determined, either by the death of the party for whose life it was

¹ Alexander *v.* Dyer, Cro. El. 169; Macdonnel *v.* Welder, 1 Stra. 550.

² Newcomb *v.* Harvey, Carth. 161; Demarest *v.* Willard, 8 Cow. 206; *ante*, § 426.

³ Mortimer *v.* Preedy, 3 M. & W. 605, per Parke, B.

⁴ Stuyvesant *v.* Davis, 9 Paige, 427.

⁵ Wallace *v.* McLaren, 1 Mann. & R. 516.

⁶ Co. Lit. 162, a; Lit. Sec. 58, 72.

granted,¹ the surrender of the lease, or by the lessor's putting an end to the lease upon a forfeiture, or recovering the lands in an action of waste.² This distinction is said to have arisen from the action of debt lying only upon the contract. When the freehold was in existence it could only be the subject of a real action, but after it was determined, the claim for rent was changed into a contract; and therefore, as soon as the estate was at an end, debt lay for the arrears previously due. It therefore required a special enactment to place freehold leases upon the same footing with leases for years.³

§ 620. Rests on Privity of Estate or Contract.—Liability of Mesne Lessee.—This action is founded either on the contract implied from privity of estate or on the express contract of demise.⁴ The right of action on the former is transferred with the estate, and enables the assignee of the reversion to sue the lessee, or, after an assignment, his assignee also;⁵ but the lessee cannot discharge himself by his own act from liability on the latter.⁶ If, however, the lessor accepts rent

¹ Co. Lit. 162, a; Bp. of Winchester *v.* Wright, 2 Ld. Ray. 1056.

² Ognel's Case, 4 Co. 48.

³ 8 Anne, c. 14, § 4; Webb *v.* Jiggs, 4 M. & S. 113; Norton *v.* Vultee, 1 Hall, 384. To the same effect is 1 N. Y. R. S. 747. The statute is confined to the case of rent *reserved by lease*, and does not extend to the arrears of an annuity, or rent-charge for life charged upon lands, for which, at common law, no action of debt will lie. Dean of Windsor *v.* Gover, 2 Wms. Saund. 304; Randall *v.* Rigby, 4 M. & W. 130; Webb *v.* Jiggs, *supra*; Kelly *v.* Clubbe, 3 Br. & B. 130. And as the common law as to annuities, or rent-charges out of land of a freehold nature, still prevails, debt will not lie for arrears thereon, so long as the estate of freehold continues. Thus it has been held that it will not lie for the arrears of a rent-charge devised to A., payable out of land devised to B. during the life of B.; and this, though it did not appear in the declaration that the grantor had a freehold in the lands. Webb *v.* Jiggs, *supra*; Kelly *v.* Clubbe, *supra*; Dean of Windsor *v.* Gover, *supra*; Randall *v.* Rigby, *supra*. But see Dupper *v.* Mayo, 1 Wms. Saund. 282, n. 1; Nield *v.* Smith, 14 Ves. 491.

⁴ Walker's Case, 3 Co. 22.

⁵ Howland *v.* Coffin, 12 Pick. 105; Walker's Case, *supra*; Humble *v.* Glover, Cro. El. 328; Patten *v.* Deshon, 1 Gray, 325; Ward *v.* Lumley, 5 Hurlst. & N. 87.

⁶ Shine *v.* Dillon, 1 Ir. R. C. L. 277; Rushden's Case, Dyer, 46; Walker's Case, *supra*; Auriol *v.* Mills, 1 H. Bl. 33; s. c. 4 T. R. 94.

from the assignee, and recognizes him as his tenant, debt no longer lies against the lessee, though covenant will on his express stipulations.¹ In like manner, if the executor or administrator should assign the lease, he still remains liable to an action of debt;² and the landlord may have his choice whether to sue the lessee or assignee,³ or both jointly;⁴ but the assignee is liable to this action only so long as he is possessed of the term, for after he assigns over his interest his liability ceases.⁵

§ 621. By Assignee of the Reversion. — By the common law, the assignee of the reversion or of the rent was only entitled to this action against the lessee after the lessee had attorned, and recognized the change of person to whom rent was due.⁶ But an attornment, as we have seen, became unnecessary after the statute of 11 Geo. II. c. 19, which has been so generally adopted in this country. Thus, the New York statute declares, where any lands or tenements shall be occupied by a tenant, a conveyance thereof, or of the rents or profits, or any other interest therein by the landlord of such tenant, shall be valid without any attornment of such tenant to the grantee; but the payment of rent to such grantor by his tenant, before notice of the grant, shall be binding upon such grantee; and the tenant shall not be liable to such grantee for any breach of the condition of the demise until he shall have had notice of such grant.⁷ And we have seen that the grantees of the reversion are entitled to the same actions which the lessor might have had if the reversion had remained in the grantor.⁸ If the lessor

¹ *Thursby v. Plant*, 1 Saund. 241; *Simpson v. Clayton*, 6 Scott, 469; *Wilkins v. Wingate*, 6 T. R. 62; *Gibson v. Kirk*, 1 Q. B. 850; *McKeon v. Whitney*, 3 Den. 452; *Rich v. Frank*, 1 Bulst. 22; *Howse v. Webster*, Yelv. 103; *Wadham v. Marlowe*, 8 East, 314; *Bliss v. Gardner*, 2 Bradw. (Ill.) 422.

² *Devereux v. Barlow*, 2 Saund. 181.

³ *Gamon v. Vernon*, 2 Lev. 231.

⁴ *Com. Dig. Det. (E.)*.

⁵ *Tongue v. Pitcher*, 3 Lev. 295; *Pitcher v. Tovey*, 4 Mod. 71.

⁶ *Co. Lit.* 309, a.

⁷ 1 R. S. 739, § 146. See also *Farley v. Thompson*, 15 Mass. 26. *Ante*, §§ 180, 441, 442.

⁸ *Ante*, § 442; 1 N. Y. R. S. 747, § 23.

assign his rent without the reversion, the assignee may maintain an action of debt for the rent, because the privity of contract is transferred;¹ but if the lessor grant away his reversion, he cannot have an action of debt for the rent, unless he specially reserves it; because, being incident to the reversion, it passes with it. The grantee of the reversion, even, cannot have debt against the lessee if he has assigned over; for there was no privity between them but a mere privity of estate, and that being gone by the assignment, this action will not lie.²

§ 622. Against the Tenant at Sufferance.—It would seem that at common law, an action of debt for rent in arrear did not lie against a tenant at sufferance; for the contract was determined, and he was adjudged to be in by wrong; but in such cases there is now a special provision. The action of debt for double the yearly value is given by statute in England and some of the United States, against tenants for life or years, or those holding under them who shall hold over wilfully.³ This statute has been held to be a penal statute; and therefore, by strict construction, a tenant for a less period than a year is not within its provisions.⁴ Nor will a tenant who holds over under a fair claim of right be considered as holding over wilfully within the meaning of the statute, though it may be decided eventually that he has no right.⁵

¹ *Allen v. Bryan*, 5 B. & C. 512; *Marle v. Flake*, 3 Salk. 118; *Williams v. Hayward*, 1 Ellis & E. 1040; *Robins v. Cox*, 1 Lev. 22; *Patten v. Deshon*, 1 Gray, 325; and see *ante*, §§ 440, 441, 447.

² *Humble v. Glover*, Cro. El. 328.

³ 4 Geo. II. c. 28, § 1; 1 N. Y. R. S. p. 745, § 11; and it is further provided that equity shall not relieve against this penalty. And see *ante*, § 526. In Georgia a tenant by sufferance resisting a warrant to dispossess is liable for double rent. *Smith v. Singleton*, 71 Ga. 68.

⁴ *Lloyd v. Rosbee*, 2 Camp. 455.

⁵ *Wright v. Smith*, 5 Esp. 203. One tenant in common may maintain an action on this statute, without his companion, for double the yearly value of his moiety; for where the injury is separate, tenants in common may have several actions. *Cutting v. Derby*, 2 W. Bl. 1077. And the action may be brought after a recovery in ejectment. *Soulsby v. Neving*, 9 East, 310. An action of contract against a tenant at sufferance, for rent while he occupies, is given in Massachusetts, by statute, though not for double value. Gen. Stat. c. 90, §§ 25, 26.

§ 623. Tenant, when Liable for Double Rent.—The same statutes also declare that if any tenant shall give notice of his intention to quit the premises holden by him, and shall not accordingly deliver up possession, he shall be liable during the time of his possession for double rent, to be recovered as *rent*.¹ A verbal lease has been held within this statute. It has also been held that the tenant need not give a fresh notice, though he has once paid double rent.² And the acceptance of single rent, accrued since the notice, is a waiver of double rent, although it does not necessarily imply a consent that the tenancy should continue.³

§ 624. Form of Declaring on.—It is a general rule that whenever an action is founded upon a deed, such deed must be declared upon; but the action of debt for rent in arrear forms an exception to this rule, for the plaintiff may here state the substance of the demise only.⁴ So the plaintiff need not set forth any entry or occupation; for though the defendant neither enters nor occupies, he must pay rent, it being due by the contract, and not in consequence of the occupation.⁵ As against an assignee, it is not incumbent on the lessor to set forth the several *mesne* assignments; it is sufficient to state, generally, that all the estate, &c., of the lessee was vested in the defendant by assignment; for it cannot be presumed that the lessor is acquainted with the particulars of the assignee's title.⁶ But if brought by an assignee of the reversion against the lessee, he must set forth the *seisin* in

¹ 11 Geo. II. c. 19, § 18; 1 N. Y. R. S. 745, § 10.

² *Ante*, § 529, and notes. ³ *Doe v. Batten*, Cowp. 243.

⁴ *Atty v. Parish*, 4 B. & P. 109; *Davis v. Shoemaker*, 1 Rawle, 135. The Statute of Limitations is a bar to an action of debt for rent in arrear, where the demise is without deed; but not where the rent is reserved by specialty. *Davis v. Shoemaker*, *supra*; *Freeman v. Stacy*, Hutt. 109.

⁵ *Bellasir v. Burbriche*, 1 Ld. Ray. 170. In this case it is said that a tenant at will is liable for rent, only, if he enters. But this is true only of tenancies implied from occupation. Wherever there is an express contract, even by parol, the rent grows due by the contract, and debt lies for it without averment or proof of entry. See *Levi v. Lewis*, 6 C. B. n. s. 766; per Willes, J.; *Fuller v. Swett*, 6 Allen, 219, n.; *Birckhead v. Cummings*, 33 N. J. 44. *Ante*, § 15, and note.

⁶ *Pitt v. Russell*, 3 Lev. 19.

fee of the first tenant, and the several *mesne* assignments down to himself; for these are necessary to make out his title, and, being matter of law, must be shown to the court.¹

§ 625. **When Transitory.—When Local.**—The action of debt or covenant by a lessor against the lessee is always *transitory*, and may be brought in any county, even if the land is in another State.² It is so, also (being founded on the privity of contract), when brought by the heirs or personal representatives of the lessor against the lessee or his personal representatives, except on covenants against incumbrances, or relating to the title or possession of the premises.³ The same rule applies to actions for use and occupation.⁴ But where the action is founded on the privity of estate only, and not on the privity of contract, it is *local*, and must be brought in the county where the land lies,⁵—as, by the lessor or his executor against the assignee of the term; or by the assignee of the term against the lessor.⁶ So are actions of debt or covenant by an assignee of the reversion against the lessee, or an assignee of the term; or by an assignee of the term against the assignee of the reversion.⁷ Debt or covenant by the lessor against the executor of the lessee, for arrears of rent accrued in the testator's lifetime only, is transitory; but if brought in the *debet* and *detinet* for rent in the executor's time, it is local; because the executor is then chargeable as assignee on the privity of estate.⁸

¹ Esp. N. P. 220.

² Bracket *v.* Alvord, 5 Cow. 18; Bulwer's Case, 7 Co. 2, a; Long *v.* Nethercote, Cro. Car. 143; Co. Lit. 282.

³ *Id.*; Thursby *v.* Plant, 1 Wms. Saund. 240, 241.

⁴ New York *v.* Dawson, 2 Johns. Cas. 335; Low *v.* Hallett, 2 Caines, 374; Henwood *v.* Cheeseman, 3 S. & R. 502.

⁵ Bord *v.* Cudmore, Cro. Car. 183; Cormel *v.* Lisset, 2 Lev. 80; 2 N. Y. R. S. 409, § 2.

⁶ Thrale *v.* Cornwall, 1 Wils. 165; Pine *v.* Leicester, Hob. 37; Spencer's Case, 5 Co. 17, a; F. N. B. 146; New York *v.* Dawson, *supra*; Henwood *v.* Cheeseman, *supra*.

⁷ Spencer's Case, *supra*; F. N. B. 146. c.

⁸ Walker's Case, 3 Co. 24; Hellier *v.* Casbard, 1 Sid. 266; Cormel *v.* Lisset, *supra*; Archb. Pl. 88; Thursby *v.* Plant, *supra*.

§ 626. **Against the Executor, Form of.**—Debt against an executor for rent incurred during the life of the testator must be in the *detinet* only.¹ But for rent incurred after the death of the lessee, the action may be brought either in the *debet* and *detinet* or in the *detinet* only, for the lessor has his election;² and the only inconvenience of suing in the *detinet* is to the plaintiff himself, who waives his right to demand satisfaction out of the estate of the defendants, and contents himself with what the testator's estate will afford. Debt by or against an executor or administrator for rent in arrear, partly in the time of the testator or intestate, and partly in the time of the executor or administrator, is well brought in the *detinet* only.³ If, in such case, the plaintiff, in the same declaration, charge the defendant in the *detinet* for the rent in the time of the testator or intestate, and in the *debet* or *detinet* for rent in his own time, the declaration will be bad on demurrer, because several judgments would be required.⁴ If A. demises land by indenture to B. for years, yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved and in arrear after the death of the lessee, although the executor never entered or agreed; for the executor represents the person of the testator, who, by the indenture, was estopped and concluded during the term to pay the rent upon his own contract, and therefore, although the rent is higher than the profit of the land, yet the executor cannot waive the land, but shall be charged with the rent.⁵

¹ 1 Roll. Abr. 603 (S.) pl. 9.

² Rich *v.* Frank, Cro. Jac. 238; Mawle *v.* Cacyffyr, *id.* 549; Royston *v.* Cordrye, Aleyn, 42, where no place was alleged in the declaration, and the particulars of demand described the premises as situated in the wrong place; yet, as the defendant held only one parcel of land under the plaintiff, and could not be misled, the mistake was held immaterial. But if the particulars of the demise are stated, they must be proved as stated. Bristow *v.* Wright, 2 Doug. 665.

³ Smith *v.* Norfolk, Cro. Car. 225.

⁴ Salter *v.* Codbold, 3 Lev. 74.

⁵ Howse *v.* Webster, Yelv. 103; Hellier *v.* Casbard, *supra*. But in this case he is chargeable only in his representatiye character, and not *de bonis propriis*, until he enters. See *ante*, § 461.

§ 627. **Tenant's Interpleader.**—Where two persons claim the rent, neither of whom has been acknowledged by the tenant as his landlord, he may file a bill of interpleader for the purpose of ascertaining to which of the claimants it is to be paid.¹ And although in general a court of equity will not allow a tenant to set up a title against his landlord, the rule does not hold where the question arises upon the act of the landlord, or other commencement of the relation of landlord and tenant.² The defendant may also show that he has been evicted, and kept out of the possession of the premises or some material part thereof, by the landlord, or by the holder of the paramount title.³ But it must appear that an eviction has actually taken place; for a mere trespass or disturbance by a stranger, or even by the lessor himself, will not cause a suspension of the rent.⁴ This defence may be made at law when the action is brought for rent reserved by the lease; but when the lessee cannot make out his defence at law, as where he has given a bond or independent covenant for the amount of the rent, a court of equity will relieve him.⁵

§ 628. **Against an Infant.**—The general plea of infancy cannot properly be pleaded to debt for rent on an indenture of lease; and where a defendant pleaded infancy at the time the lease was made, the court upon demurrer held that as the lease might be for the benefit of the infant, it was voidable only at his election, by waiving the lease before the rent-day; but it not being shown that the rent was of greater value

¹ *Hodges v. Smith*, 1 Cox, 357. Or where the landlord's title is not brought in question, as where a stranger claims the rent under an alleged assignment by the landlord, or as purchaser of the estate. *Ketcham v. Brazil Rock Coal Co.* 88 Ind. 515.

² *Cowtan v. Williams*, 9 Ves. 107; *Clarke v. Byne*, 13 id. 383; *Belbee v. Belbee*, 6 Madd. 28; *McCoy v. McMurtrie*, 12 Phila. 180; *Story, Eq. Jur.* §§ 811, 812.

³ *Stroud v. Willis*, Cro. El. 362; *Dalston v. Reeve*, 1 Ld. Ray. 77; *Burn v. Phelps*, 1 Stark. 94.

⁴ *Reynolds v. Buckle*, Hob. 326; *Bushell v. Lechmore*, 1 Ld. Ray. 369; *Penn v. Glover*, Cro. El. 421; *Taylor v. Zamira*, *supra*; *ante*, §§ 377–380.

⁵ *Poston v. Jones*, 2 Ired. Eq. 350.

than the land, and the defendant being of full age before the rent-day, the plaintiff had judgment.¹ A plea that no rent is in arrear and unpaid is equivalent to a plea of *nil debet*, since it relates not to the time of the plea pleaded, but to the commencement of the action.² A receipt for rent due at a particular time will be good presumptive evidence that all previous rent has been paid; but this, like every other presumption, may be rebutted, or it may be shown that the receipt itself was obtained collusively or by fraud.³ But a receipt for rent by one claiming adversely to the plaintiff, is not admissible without some evidence of an attornment.⁴

§ 629. Tenant estopped to deny his Landlord's Title. — The rule is well settled that a tenant is not allowed to dispute his landlord's title, after having accepted possession under him.⁵

¹ Ketsey's Case, Cro. Jac. 320; Evelyn *v.* Chichester, 3 Burr. 1719; 1 Roll. Abr. 731. In debt on a specialty, there is a material distinction between those cases in which the deed is only inducement to the action, and matter of fact the foundation of it, and those in which the deed itself is the foundation and the fact merely inducement; for though the plaintiff declare setting forth an indenture of lease, yet, as the fact of the subsequent occupation gives the right to the sum demanded, and is the foundation of the action, and the lease is mere inducement, the defendant may plead *nil debet*. Dupper *v.* Mayo, 1 Wms. Saund. 276, n. 1, 2; Dean of Windsor *v.* Gover, 2 *id.* 297, n. 1; Bullis *v.* Giddens, 8 Johns. 82. This plea puts the plaintiff on proof of his whole declaration, and under it an eviction, payment, or release may be given in evidence. But in debt for rent on an indenture of lease, the defendant cannot, under it, give in evidence that the plaintiff had *no estate* in the tenements; because, if he had pleaded that specially, the plaintiff might have replied the indenture, and estopped him. Blake *v.* Foster, 8 T. R. 487; Syllivan *v.* Stradling, 2 Wils. 208. It seems that, in Pennsylvania, a defendant may give the Statute of Limitations in evidence under the plea of *nil debet*. Davis *v.* Shoemaker, 1 Rawle, 135.

² Warner *v.* Theobald, Cowp. 588.

³ Skaife *v.* Jackson, 3 B. & C. 421; Patters *v.* Ackerson, 2 Edw. 427; Farrar *v.* Hutchinson, 9 Ad. & E. 641.

⁴ Newlin *v.* Palmer, 11 S. & R. 98.

⁵ Jackson *v.* Hinman, 10 Johns. 292; *post*, § 705. A lessee after enjoyment is estopped to deny the title of his landlord: Bailey *v.* Kilburn, 10 Met. 176; Benedict *v.* Morse, *id.* 223; Epstein *v.* Greer, 85 Ind. 372; Dwinell *v.* Brown, 65 Ga. 438; James *v.* Belding, 33 Ark. 536; Lyon *v.* Washburn, 3 Col. 201; Hodges *v.* Shields, 18 Ky. 828; Trabue *v.* Ram-

A lessee by indenture is technically estopped from denying it; and this, if not the origin of the rule, seems to have been the only occasion of its occurrence under the early common law. But it is now of general application, whenever possession has been taken under any species of tenancy, whether the action be *assumpsit*, debt, covenant, or ejectment. A lessee may, however, plead that although the lessor had an interest in the premises at the time of the making of the lease, his interest terminated before the alleged cause of action arose.¹ As the extent and limits of this doctrine are of like application in each form of action or tenancy, and are more fully considered in a later portion of our work, the reader is referred thither for details.²

§ 630. Not the Subject of Set-off. — We have seen³ that, notwithstanding an early decision in England to the contrary,⁴ a tenant cannot set off in an action of debt for rent damages from breaches of the landlord's covenant or agreement, be-

age, 80 *id.* 323; except in cases of fraud or mistake in the execution of the lease: *Ingraham v. Baldwin*, 9 N. Y. 45; *St. Louis v. Morton*, 6 Mo. 476; *Lively v. Ball*, 2 *id.* 53. If the defendant has gained possession by attorning to the plaintiff's title, it is not in his power to destroy his landlord's right by secretly attempting to get another. *Eister v. Paul*, 54 Pa. St. 196. In *Saunders v. Moore*, 14 Bush, 97, the estoppel was held to prevail as against the tenant until he had surrendered possession, although he had not entered under his title. The rule was applied to one who, a slave in 1863, entered as tenant, and, in 1865, being then free, attempted to disclaim. *Wilson v. James*, 79 N. C. 349. The tenant is estopped to deny his lessor's incorporation. *Imboden v. Mining Co.*, 70 Ga. 88; nor, where there are several joint lessors, can he inquire into their individual interests. *Hecht v. Ferris*, 45 Mich. 376. Where both parties supposed the lessor, a board of school trustees, to have title, but the legislature had divested the title and both parties acknowledged the divestiture, it was held that the lessee might set up this defence without denying or disputing the landlord's title. *Borland v. Box*, 62 Ala. 87, Brickell, C. J., dissenting. But the estoppel was held to apply in the case of a lease by a town where the tenant sought to set up the fact that the statute under the authority of which the lease was made was unconstitutional. *Jamaica v. Hart*, 52 Vt. 549.

¹ *Langford v. Selmes*, 3 Kay & J. 220.

² See *post*, §§ 705-707.

³ *Ante*, § 374.

⁴ *Taylor v. Beal*, Cro. El. 222.

cause these are unliquidated.¹ The decisions in that country which have an apparently different bearing will be found on examination to be cases of *payment*, and not of set-off,—the landlord's express agreement justifying the application of money made by the tenant;² or the tenant by the landlord's default having been compelled to pay the rent to the holder of the paramount title, which is treated as an implied request by the landlord.³ Such payments may accordingly be pleaded to an avowry.⁴ And it is a good plea that the landlord recovered part or the whole of the rent by levy of a distress and sale thereof. But if he has sold the goods distrained for too low a price, this loss can only be recovered by the tenant in a separate action.⁵

§ 631. But subject to Tenant's Recoupment.—But by the law of recoupment, as now established in many of the United States, the tenant can avail himself, as a defence *pro tanto* to an action of debt for rent, of the landlord's breach of his covenants.⁶ This he is permitted to do, whether the different

¹ Thus not for damages which he has sustained from the breach of the lessor's agreement to finish or repair the premises. *Allen v. Pell*, 4 Wend. 505. Or to make an erection upon the premises. *Etheridge v. Osborn*, 12 *id.* 399. Or to allow common of pasture. *Livingston v. Livingston*, 4 Johns. Ch. 287. Nor can the tenant set off his claim to have his improvements paid for at the end of the term. *Tuttle v. Tompkins*, 2 Wend. 407. See also *Clayton v. Kinaston*, 1 Ld. Ray. 419; *Weigall v. Waters*, 6 T. R. 488; *Howlet v. Strickland*, Cowl. 56. As to the general rule that unliquidated damages cannot be the subject of a set-off, see *Hepburn v. Hoag*, 6 Cow. 613; *Butts v. Collins*, 13 Wend. 139; *Mead v. Gillett*, 19 *id.* 397; *Hackett v. Connet*, 2 Edw. 73; *Duncan v. Lyon*, 3 Johns. Ch. 351.

² *Roper v. Bumford*, 3 Taunt. 76; *Dallman v. King*, 4 Bing. N. C. 105. But where a tenant holding over, being sued for double the yearly value and in another count for use and occupation, tendered the amount of the single rent, which the lessor accepted, but did not withdraw his suit,—it was held that the tender, not having been specifically applied or received in satisfaction of the single rent, was only a bar *pro tanto* to the larger sum claimed. *Ryal v. Rich*, 10 East, 48.

³ *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524; *Read v. McAllister*, 8 Wend. 109; *Westlake v. DeGraw*, 25 Wend. 669; *Carter v. Carter*, 5 Bing. 406. And see *ante*, § 374.

⁴ *Sickles v. Frost*, 15 Wend. 559; *Sapsford v. Fletcher*, *supra*.

⁵ *Efford v. Burgess*, 1 Mood. & R. 23.

⁶ See *ante*, § 374.

parts of the contract are contained in one instrument or in several; whether one part of the contract be in writing and the other by parol;¹ or whether the action be founded on a sealed or an unsealed instrument. But if the defence, in such case, goes only to some part of the consideration, the defendant cannot plead it specially, but must give notice of it; though it is otherwise when it goes to the whole consideration.²

§ 632. Lies in behalf of Subsequent Mortgagee, when. — A mortgage made subsequent to a lease amounts to an immediate grant of the reversion; and the mortgagee is entitled to all the remedies for the recovery of rent, accruing subsequently to an assignment, which belong to other assignees of the reversion.³ All that has accrued before is a mere *chose in action*, and consequently not assignable. But as against tenants holding under leases made by the mortgagor subsequent to the mortgage, the mortgagee can neither distrain nor sue for rent in any action, since there is neither privity of contract nor of estate between the parties.⁴ As, however, recent legislation, or the local law of many States, has very generally taken away from the mortgagee the right either to possession or to the rent before foreclosure, a surrender of possession, and attornment or payment to him, is no longer a defence to an action by the mortgagor for rent.⁵

¹ Batterman *v.* Pierce, 3 Hill, 171.

² Van Epps *v.* Harrison, 5 Hill, 63; Barber *v.* Rose, *id.* 76. Upon an agreement to rent a house and lot, out of the rent of which was to be deducted *any repairs that may be done to the same*, the erection of a variety of out-houses on the lot was held not to be repairs. Adm'r of Darby *v.* Farrow, 1 McCord, 517. Evidence of a parol agreement outside of a written lease, to make repairs or improvements on the premises, is inadmissible. Mayer *v.* Moller, 1 Hilt. 491. Mayor *v.* Price, 5 Sandf. 542. See also Whitbeck *v.* Skinner, 7 Hill, 53.

³ Burden *v.* Thayer, 3 Met. 79; 4 Kent, Com. 165.

⁴ Mayo *v.* Shattuck, 14 Pick. 533; McKircher *v.* Hawley, 16 Johns. 290. And the non-payment of rent for a period of twenty, or even twenty-four years, will not be sufficient to justify a presumption of payment, where circumstances exist tending to excuse the delay in demanding rent; nor, under such circumstances, will a release or conveyance extinguishing the rent be presumed. Cole *v.* Patterson, 25 Wend. 456.

⁵ See *ante*, § 122, and notes.

§ 633. **Plea of Tender.** — The defendant may also plead a tender of the amount due, in all cases where the duty or sum demanded is certain, or capable of being reduced to a certainty by calculation. It is, therefore, allowed in debt, *assumpsit*, and covenant, where the breach is the non-payment of money, or the performance of a specific thing; but not in actions on the case, trespass, or trover, or in any other in which the damages are unliquidated.¹ At common law, a tender could not be made after suit brought.² But this is now otherwise by statute, or local practice, in many States.³

§ 634. **Tender of Money. — Of Specific Articles.** — There is a material distinction, however, to be observed between the effect of a tender of money due upon a contract, and a tender of specific articles. In the former case, though a tender be made and the plaintiff refuses the money, the tender cannot be pleaded in bar of the action, either in debt or *assumpsit*, but in bar of the damages only, that is, of interest and cost; for the debtor must always have the money ready to pay his debt.⁴ But a tender and refusal of particular articles when they are cumbrous, and will subject the party tendering to a charge for keeping them,—as cattle, or any other articles requiring warehouse room, which indeed embraces almost every article except money,—is a complete discharge of the contract for delivery; and the party is not bound to hold himself ready, or *keep the tender good*, as in case of money. He nevertheless holds the articles as bailee, and at the risk of the person to whom they have been ten-

¹ Bac. Abr. tit. Tender.

² Hubbard v. Bank of Chenango, 8 Cow. 88.

³ Thus, in New York and Massachusetts, the statutes permit a tender, or payment into court after action brought, of the amount due, and interest and costs to the date of payment; and if the plaintiff does not recover a larger sum he can recover no costs incurred subsequently to such tender or payment, but is himself liable to the defendant for such costs. 2 N. Y. R. S. 457, §§ 20, 23; Slack v. Brown, 13 Wend. 394; Graham's Practice, 2d ed. 533.

⁴ Wolcott v. Van Santvoord, 17 Johns. 253; Jackson v. Law, 5 Cow. 248; La Grew v. Cooke, 1 B. & P. 332.

dered, subject to be demanded of him, or any other person into whose hands they may come; and if refused, an action of trover lies for their value.¹

SECTION III.

THE ACTION FOR USE AND OCCUPATION.

§ 635. **When maintainable. — Seeks as Damages an Equivalent for Rent.** — At common law, an action of *assumpsit* for use and occupation could not be maintained if there was an express demise.² Debt for use and occupation would always lie,³ but the plaintiff in *assumpsit* was liable to a nonsuit if

¹ Per Kent, J., *Coit v. Houston*, 3 Johns. Ca. 249; *Raymond v. Bearnard*, 12 Johns. 274; *Mehaffy v. Spears*, 1 Hayw. 142; *Lamb v. Lathrop*, 13 Wend. 95. As to what constitutes a good tender, see *ante*, § 393.

² This applies only to *indebitatus assumpsit*. Special *assumpsit* lay at common law on an express demise, though only where an express promise to pay rent was proved,—such a promise being regarded as collateral to the tenancy. *Hunt v. Stone*, Cro. El. 118; *Brett v. Read*, Cro. Car. 343; *Acton v. Symon*, *id.* 414. And this was permitted though it appeared that the premises had been occupied, and the action of debt also lay. *Id. Indebitatus assumpsit* would not lie where there was an express demise for a fixed time, or rent and a promise to pay it, because in an action merely for rent arrear sounding in the realty, debt was the exclusive remedy. *Reade v. Johnson*, Cro. El. 242; *Clark v. Palady*, *id.* 859; *Brett v. Read*, *supra*. Where, however, the compensation was not rent, but a gross sum agreed upon, or the occupancy was general, though for a fixed weekly rate, such *assumpsit* lay, even on an express promise and after enjoyment had. *Slack v. Bonsal*, Cro. Jac. 668; *Dartnal v. Morgan*, *id.* 598; *Symcock v. Nayn*, Cro. El. 786. Actions of this character doubtless gave rise to *indebitatus assumpsit* for use and occupation on a general permissive occupancy, with no rate fixed, where the compensation accrues *de die in diem*, though no instances of such *assumpsit* can be found before the statute of “Geo. II., nor any founded on a *quantum meruit*; they are all for some fixed sum.” Per Denman, C. J., *Gibson v. Kirk*, 1 Q. B. 850, 855. If, therefore, the elements of a strict demise appeared, the action was liable to be defeated; but if the agreement was anything less, its terms were only evidence of the amount of the compensation to be paid for the use of the land.

³ *Gibson v. Kirk*, 1 Q. B. 850. See *King v. Fraser*, 6 East, 348; *Egler v. Marsden*, 5 Taunt. 25; *Curtis v. Spitty*, 1 Bing. N. C. 17.

an express demise was proved.¹ This restriction was removed by the statute 11 Geo. II. c. 19, where the demise was not by deed, and recovery in an action of *case*, that is, *assumpsit*, was allowed, notwithstanding an express demise not under seal was proved.² In this action the landlord recovers not *rent*, but an equivalent for the rent, that is to say, a reasonable satisfaction for the use and occupation of the premises which have been held and enjoyed under the demise; and the rent fixed by the agreement is only used as a medium by which the damages in this form of action shall be ascertained and liquidated.³ This statute is intended to provide an easy

¹ *Beverley v. Linc. Gas L. Co.*, 6 Ad. & E. 839, and note; *Gibson v. Kirk, supra*.

² A similar statute exists in New York, 1 R. S. 739, § 26. The statute is also in force in Pennsylvania, 3 Binn. 626, and probably in most of the United States. See cases *infra*. In Massachusetts, however, in *Fuller v. Swett*, 6 Allen, 219, n.; *Mann v. Brewer*, 7 Allen, 202; *Warren v. Ferdinand*, 9 *id.* 357; and *Smiley v. McLauthlin*, 138 Mass. 363, the existence of an express demise of any kind was held a bar to an action of use and occupation. This is the more noticeable, as in that State the action of contract now includes debt, and this always lay, even on an express demise. *Gibson v. Kirk, supra*. In *Codman v. Jenkins*, 14 Mass. 93, the action was *assumpsit*, and the lease was under seal. In *Hunt v. Thompson*, 2 Allen, 341; *Burnham v. Roberts*, 103 Mass. 379, the leases were also under seal, but the action might have been regarded as debt for use and occupation, and this in *Fuller v. Ruby*, 10 Gray, 285, was held to lie even on a specialty. It has frequently been thought that this statute gave the action of *assumpsit* for use and occupation. See *Featherstonhaugh v. Bradshaw*, 1 Wend. 135; *In re Stockton*, 3 Brewst.; 320; s. c. 64 Pa. St. 58; *Cleves v. Willoughby*, 7 Hill, 83; but this is an error; it only removed one bar to it. "An action for use and occupation existed before 11 Geo. II. c. 19, but until the passing of that act the plaintiff was liable to be nonsuited, if an express demise was proved. Except in that particular, the statute did not make the action maintainable where it would not have been maintained before." Per *Bramwell, B., Churchward v. Ford*, 2 Hurlst. & N. 446. So per *Denman, C. J., Gibson v. Kirk, supra*; *Hunt v. Wolfe*, 2 Daly, 298, 302. And in Michigan this action lies, though the lease is under seal. *Dalton v. Laudahn*, 30 Mich. 349. It seems that in West Virginia, under Code, c. 93, § 97, the action is not maintainable when the lease is by deed. *Goshorn v. Steward*, 15 W. Va. 657.

³ This was the law before the statute in cases where there was not a strict demise. *Dartnal v. Morgan, supra*.

remedy in the simple case of an actual occupation, leaving other more complicated cases to their appropriate and ordinary remedy.¹

§ 636. To maintain, Relation of Landlord and Tenant must subsist.—Although the law will generally imply a contract to pay a compensation for the use and occupation of any premises, yet the possession of a mere trespasser will not sustain this action.² It lies indeed only where the conventional relation of landlord and tenant subsists between the parties, founded on an agreement express or implied.³ But in a case where a

¹ Williams *v.* Sherman, 7 Wend. 109; Naish *v.* Tatlock, 2 H. Bl. 319. It has sometimes been made a question whether *assumpsit* can lie without an express promise. The better opinion seems to be that it does: Gunn *v.* Scovill, 4 Day, 228; Rogers *v.* Tracy, 1 Root, 233; Eppes *v.* Cole, 4 Hen. & M. 161; Estep *v.* Estep, 23 Ind. 114; Crouch *v.* Brilles, 7 J. J. Marsh. 257; and did at common law: *id.*; and see How *v.* Norton, 1 Lev. 179.

² But the owner may waive the trespass and recover for use and occupation; in which case the *tortfeasor* cannot defeat the action by interposing his own wrong. If, however, the landlord has determined that the occupant is a trespasser, as by bringing summary process for possession, he must abide by his decision and cannot have *assumpsit* for use and occupation. It is said to be on this ground that Featherstonhaugh *v.* Bradshaw, 1 Wend. 135 (see § 635, *ante*), and Goddard *v.* Hall, 55 Me. 579, were decided. National Oil Ref. Co. *v.* Bush, 88 Pa. St. 335.

³ Smith *v.* Stewart, 6 Johns. 46; Stoddart *v.* Newman, 7 Har. & J. 251; McFarlan *v.* Watson, 3 N. Y. 286; Chambers *v.* Ross, 1 Dutch. 293; Chamberlin *v.* Donohue, 44 Vt. 57; Moore *v.* Harvey, 50 *id.* 297; Cunningham *v.* Horton, 57 Me. 430; Brolasky *v.* Ferguson, 48 Pa. St. 434; Dalton *v.* Landahn, 30 Mich. 349; Dudding *v.* Hill, 15 Ill. 61; McNair *v.* Schwartz, 16 *id.* 24; Newby *v.* Vestal, 6 Ind. 412; Pittsburg, Cin. & St. L. R. R. *v.* Thornburgh, 98 *id.* 201; and see Tinder *v.* Davis, 88 *id.* 99; Aull Savings Bank *v.* Aull, 80 Mo. 199; Williams *v.* Hollis, 19 Ga. 313; Cohen *v.* Kyler, 27 Mo. 122. See *ante*, § 25, and note. It does not lie where the defendant's entry was tortious: McCloskey *v.* Miller, 72 Pa. St. 151; Name *v.* Alexander, 49 Ind. 516; Hurd *v.* Miller, 2 Hilt. 540; Smith *v.* Houston, 16 Ala. 111; Ackerman *v.* Lyman, 20 Wisc. 454; Tew *v.* Jones, 13 M. & W. 12; Turner *v.* Coal Co., 5 Exch. 982; or under a third party: Cripps *v.* Blank, 9 D. & R. 480; Camden *v.* Batterbury, 5 C. B. n. s. 808; Churchward *v.* Ford, 2 Hurlst. & N. 449; Chamberlin *v.* Donohue, *supra*; Merrill *v.* Bullock, 105 Mass. 489, where the occupancy was under the tenant, but without title; and see *ante*, § 25, n. 5; nor where the tenant disowns the landlord's title: Jackson *v.* Mowry, 30 Ga.

lease was executed for a year, at a quarterly rent, and the defendant, who entered under the lessee at the commencement of the term, and occupied for the whole year, paid the first quarter's rent to the agent of the lessor, and took receipts from him as such agent,— it was held that a jury might infer an agreement to pay rent to the lessor, so as to maintain an action in his name for use and occupation during the last quarter of the term.¹ If, however, the position of the parties to

143; *Littleton v. Winn*, 31 Ga. 583; *Merrill v. Bullock*, *supra*; *Boston v. Binney*, 11 Pick. 1. So, when the idea of tenancy is negatived by the conduct of the landlord. *Gretton v. Smith*, 33 N. Y. 245. Thus, where a tenant from year to year quitted without notice, but the lessor relet before rent-day, he could not recover in this action for the broken term. *Hall v. Burgess*, 5 B. & C. 322; and see *Thomas v. Cook*, 2 B. & A. 119; *Jennings v. Alexander*, 1 Hilt. 154. This action cannot be maintained, unless there is an agreement for the use of the premises, express or implied, between the plaintiff and defendant. *Campbell v. Renwick*, 2 Bradf. 80; *Hall v. Southmayd*, 15 Barb. 32; *Glover v. Wilson*, 2 Barb. 264; *Stewart v. Finch*, 31 N. J. 17; *Lockwood v. Thunder Bay Co.*, 42 Mich. 536; *Bates v. Phinney*, 45 *id.* 388. Thus, making occasional use of a contiguous lot, formerly parcel of the demise, will not justify the action: *Rowland v. Pendleton*, 21 Ohio St. 664; or where the lessee of a coal mine takes other coal of lessor's: *McCloskey v. Miller*, 72 Pa. St. 151. So, where at the end of a lease some of the partners, lessees, left, and other members came into the firm, the former were held not liable. *James v. Pope*, 19 N. Y. 322. But where a proposed lessee put up his sign and put in some of his property, he was held liable in this action. *Franklin v. Pewtress*, 43 Conn. 167. See *Bacon v. Parker*, 137 Mass. 309. And an assignee who quits because the lessee cannot get an assent by the lessor to the assignment, cannot be sued by the lessee in use and occupation. *Couch v. Tregonning*, L. R. 7 Exch. 88. The action will not lie against the principal when there is an outstanding lease in the name of the agent. *Kiersted v. Railroad Co.*, 55 How. Pr. 51. Nor against the mortgagor in possession and his assigns, unless an agreement be shown. *Porter v. Hubbard*, 134 Mass. 233. See *Morse v. Merritt*, 110 *id.* 458. It will lie upon an implied permission. *Peckham v. Leary*, 6 Duer, 494; *Pierce v. Pierce*, 25 Barb. 243; *Hillier v. Silcox*, 19 Law Jour. n. s. 295, Q. B., as explained in *Churchward v. Ford*, *supra*; *Clark v. Green*, 35 Ga. 92; *Kline v. Jacobs*, 68 Pa. St. 57; *Sharp v. Fields*, 1 Heiskell, 571; and see *ante*, §§ 19–21.

¹ *Bancroft v. Wardwell*, 13 Johns. 489. So where a party had the beneficial occupation of premises for six weeks, and left because he could not agree upon terms with the other party. *Dawes v. Dowling*, 31 L. T. (N. S.) 65, Exch. So where the tenant was occupying under a lease for

each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied. This action cannot, therefore, be sustained against a person who came in under the plaintiff as purchaser, although he may continue to hold after the contract of sale has fallen through, for rent accruing previous to the breaking off of the contract.¹ So with respect to one who enters under an agreement for a lease, which the owner subsequently refuses to execute.² And, where the defendant and another person conveyed to the plaintiff an undivided moiety of several houses, of which they were seised as devisees in trust, but of one of the houses the defendant had long before been in possession, and continued to occupy it after the conveyance, it was held that such occupation did not of itself entitle the plaintiff to sue for use and occupation.³

§ 637. Will not lie after Tenant's Estate is determined or dis-owned. — For a similar reason, this action will not lie, after a recovery in ejectment, for rent accruing after the day of the

years to commence *in futuro*, and so void under the Statute of Frauds. *Smith v. Kiukaid*, 1 Bradw. (Ill.) 620; *vide* § 650, *post*. So held where the action was by a sheriff's vendee against a tenant who held under a lease made subsequent to the incumbrance under which the sheriff's sale was made, notwithstanding the vendee had disaffirmed the lease by giving a notice to quit, since the occupation might be permissive. *Mozart Build'g Ass'n v. Friedjen*, 12 Phila. 515.

¹ *Osgood v. Dewey*, 13 Johns. 240; *Curtis v. Treat*, 21 Me. 525; *Hall v. Burgess, supra*; *Coffman v. Howyer*, 19 Mo. 435, 440; *Richmond T. Co. v. Rogers*, 7 Bush, 532; *Dennett v. Penobscot F. I. Co.*, 57 Me. 425; and see *ante*, § 25, n.

² *Greton v. Smith*, 33 N. Y. 245. But he is liable if he enters under a lease given by an agent, which may be void for want of authority: *Vanderbilt v. Persse*, 3 E. D. Smith, 428; or where the lease is invalid by reason of wanting the lessee's corporate seal: *Whitford v. Laidler*, 94 N. Y. 145. Where on a lease of several houses at a fixed sum to be paid for all, the lessor was unable to give immediate possession of one house, and the lessee failed to rescind the contract and entered into possession of the other houses, he was held to be liable in use and occupation for the rent of these. *Smart v. Allegaert*, 14 Phila. 179.

³ *Tew v. Jones*, 13 M. & W. 12. Occupancy implies the exclusion of every one else from enjoyment. *Redfield v. Utica & S. R., R.*, 25 Barb. 54.

demise;¹ nor for the use and occupation of mortgaged premises, after the mortgagee has taken possession, and the tenant has attorned to him, notwithstanding the mortgagee's entry may not have been effectual for the purpose of foreclosure;² nor against a tenant who holds over, after the expiration of his term, where proceedings have been instituted against him, to turn him out of possession under the statute; for such proceeding is in the nature of an action of ejectment, by which the relation of landlord and tenant is disowned.³ The plaintiff's remedy, in the latter case, is either by an action of trespass for the mesne profits, or for double rent under the statute.⁴ The mere bringing of an ejectment, however, and laying the demise prior to the accruing of the rent claimed, will not bar this action.⁵ Yet, if a party is let into possession under a contract of sale which goes off, he is liable in use and occupation, at the suit of the vendor, for the period during which he continued in possession after the contract went off; although he may not be for occupation prior to the rescinding of the contract.⁶ So of a tenant at will, after he has left the premises without giving due notice of an intention to terminate his tenancy, although he afterwards derives no benefit therefrom.⁷ But in no case does it lie, unless the plaintiff has the legal estate,⁸ nor where the title is in dispute; for the

¹ *Birch v. Wright*, 1 T. R. 378.

² *Welch v. Adams*, 1 Met. 494.

³ *Featherstonhaugh v. Bradshaw*, 1 Wend. 134.

⁴ *Clarance v. Marshall*, 2 Cr. & M. 495. So where the rent is to be paid in improvements, *assumpsit* for use and occupation will not lie because tenant has failed to make them; *Raybourn v. Ramsdell*, 78 Ill. 622; nor will a tort be waived and this action lie: *Edmonson v. Kite*, 43 Mo. 176; though see *ante*, § 19, n. 4; and in Pennsylvania this is permitted, because the form of the action is regarded as immaterial: *Stockton's App.*, 64 Pa. St. 58.

⁵ *Cobb v. Carpenter*, 2 Camp. 13, n.

⁶ *Howard v. Shaw*, 8 M. & W. 118; *Little v. Pearson*, 7 Pick. 301; *Welch v. Andrews*, 9 Met. 78; *Dwight v. Cutler*, 3 Mich. 566. But in Illinois it lies in this case by statute, Feb. 20, 1861. *Hadley v. Morrison*, 39 Ill. 392.

⁷ *Walker v. Furbush*, 11 Cush. 366. See also *Whitney v. Gordon*, 1 *id.* 266.

⁸ *Cobb v. Carpenter*, *supra*.

court will not try the title in this action, the proper remedy in such case being by ejectment.¹

§ 638. Lies for Enjoyment of Incorporeal Hereditaments.—

Examples.— This action lies not only for the enjoyment of corporeal, but also of incorporeal hereditaments, even though the letting was by parol,²— as, for the enjoyment of tolls, a fishery, or watercourse; or by the owner of a market for stallage.³ And where the defendant had agreed to take of the plaintiff some veins of iron ore for forty years, at a certain rent, engaging to work the veins in certain proportions, the plaintiff agreeing to grant such a lease,— it was held to be, not a mere license, but a right constituting an hereditament, and that use and occupation would lie.⁴ A landlord who has received a note for rent may sue in *assumpsit* for use and occupation, on delivery of the note at the trial to be cancelled. Or, if he has distrained and sold the goods of the tenant for part of the rent, he may maintain this action for the residue.⁵ So, if a lessee holds over after notice from the landlord that in case he holds over beyond the day specified in the notice he shall pay an increased rent, the holding over is an assent to the new rent, and the landlord may recover it in this action.⁶

§ 639. Maintainable by Assignee of Reversion.—Not by Parties not in Privity.— Since the statute dispensing with the necessity of an attornment by the tenant, he is liable in this action to the assignee of the reversion for occupation after

¹ *Evertsen v. Sawyer*, 2 Wend. 507.

² *Bird v. Higginson*, 2 Ad. & E. 696.

³ *Mayor v. Sanders*, 3 B. & Ad. 411; *Davis v. Morgan*, 4 B. & C. 8. Or of a right of way. And it is no defence to an action that other persons have the same right if the right is in neither case exclusive; nor are such other persons necessary parties. *Ledyard v. Morey*, 54 Mich. 77.

⁴ *Jones v. Reynolds*, 4 Ad. & E. 805.

⁵ *Cornell v. Lamb*, 20 Johns. 407. A promissory note given and received for rent does not extinguish the claim for rent, which is a debt of a higher degree than that arising upon a note. *Davis v. Gyde*, 2 Ad. & E. 623. And see *Tobey v. Barber*, 5 Johns. 68; *Van Eps v. Dillaye*, 6 Barb. 244; *Davis v. Allen*, 3 N. Y. 168.

⁶ *Loftt*, 153.

notice of his title, but not for that which preceded such notice.¹ This action may also be maintained by a mortgagee of the reversion ;² or by the grantee of an annuity, to whom the lessor has conveyed the demised premises as security.³ But not by a *cestui que trust*, where the letting has been by the trustee ;⁴ nor by any person claiming under the *cestui que trust* ;⁵ nor by an agent of the lessor.⁶ It lies, although the plaintiff has parted with the whole of his interest to the defendant, if he has reserved the rent, and the defendant has agreed to pay it.⁷ It will not lie, however, by a person merely claiming the estate, against the occupants of the premises who have never held under him, however good the title of the claimant may be.⁸ But an assignee of a lease, who has been recognized as such by the tenant, by payment of rent or otherwise, may sue in his own name for rent, although he may have no interest in the reversion.⁹

§ 640. Form of Declaring in. — Where the demise is by deed, the lessor must declare specially on the demise, and cannot recover under the general *indebitatus assumpsit* for use and occupation ;¹⁰ and the rule is the same whether the action is against the original lessee or his assignee ; although the lessor may recover upon an *insimil computassent*, even if the evi-

¹ *Birch v. Wright*, 1 T. R. 378; *Lumley v. Hodgson*, 16 East, 99; *Rennie v. Robinson*, 1 Bing. 147; *Mortimer v. Preedy*, 3 M. & W. 602; Thus to the purchaser at an execution sale: *Hayden v. Patterson*, 51 Pa. St. 235; and the assignee of the lessor, though the lease is not under seal, may, if recognized by the tenant, enforce the obligations of the lease: *Cornish v. Stubbs*, L. R. 5 C. P. 334.

² *Rawson v. Eicke*, 7 Ad. & E. 451; *Lucier v. Marsales*, 133 Mass. 454.

³ *Birch v. Wright*, *supra*. ⁴ *Morgell v. Paul*, 2 Mann. & R. 303.

⁵ *Harris v. Booker*, 12 Moore, 283.

⁶ *Evans v. Evans*, 3 Ad. & E. 132.

⁷ *Baker v. Gostling*, 1 Bing. N. C. 19; *Pollock v. Stacy*, 9 Q. B. 1033. But this is doubted, see *ante*, § 16, note 5.

⁸ *Cripps v. Blank*, 9 D. & R. 480. For a mere change in the ownership does not enable the new owner to sue for rent accruing during the period of his ownership. *Doyle v. O'Neil*, 7 Mo. App. 138.

⁹ *Moffat v. Smith*, 4 N. Y. 126.

¹⁰ *Hunt v. Thompson*, 2 Allen, 341; *Burnham v. Roberts*, 103 Mass. 379.

dence be of an accounting concerning rent secured by deed.¹ But where a tenant occupied under an agreement for a lease, under seal, he was held to be chargeable in *assumpsit* for use and occupation, because he did not hold under the deed, but merely under the agreement.² And where a lease by deed had expired, and the tenant held over, the landlord was also permitted to recover for the subsequent use and occupation.³ In a case where the defendant had occupied certain premises by virtue of a lease under seal, containing a covenant for renewal, which covenant, however, was void for uncertainty; and at the expiration of the term, the parties could not agree as to a renewal of the lease, but the tenant held over several years without paying rent, — this action was held maintainable, to recover the rent due after the expiration of the lease.⁴

§ 641. Defendant's Possession requisite. — Constructive Possession. — This action will not lie where the defendant never took possession of the demised premises, either personally or by his agent; and if there has been no occupation for any portion of the term, the only remedy is upon the agreement for damages in not taking possession.⁵ But no continued occupation for any particular length of time need be shown; possession being once taken, its continuance will be presumed, and the agreement determines the period to which the liability of the party extends.⁶ Nor is an actual or personal occupation

¹ *West v. Cartledge*, 5 Hill, 488; *Dungey v. Angove*, 2 Ves. 307; *Codman v. Jenkins*, 14 Mass. 93; *Blume v. McClurken*, 10 Watts, 380.

² *Little v. Martin*, 3 Wend. 219; *Gillott v. Rogers*, 4 Esp. 59.

³ *Harding v. Crethorn*, 1 Esp. 57; *Longfellow v. Longfellow*, 54 Me. 240; *Greton v. Smith*, 33 N. Y. 245; *North v. Nichols*, 37 Conn. 375.

⁴ *Abeel v. Radcliff*, 13 Johns. 297; s. c. 15 *id.* 505.

⁵ *Wood v. Wilcox*, 1 Den. 37; *Jones v. Reynolds*, 7 Carr. & P. 335; *Whitehead v. Clifford*, 5 Taunt. 518; *Sanford v. Johnson*, 26 Minn. 314. The defendant abandoned the premises, and then plaintiff took possession, and relet them to a third person; and it was held that as thereafter the defendant had not actually occupied or legally possessed the premises, he was not liable for use and occupation. *Beach v. Gray*, 2 Den. 84.

⁶ *Sullivan v. Jones*, 3 Carr. & P. 579; *Woolley v. Watling*, 7 *id.* 610; *Edge v. Strafford*, 1 Cr. & J. 391; *How v. Kennet*, 3 Ad. & E. 659; *Seaman v. Ward*, 1 Hilt. 52. And notwithstanding the tenant may have de-

by the defendant required to support this action; it is enough that he had the right to occupy,—and the constructive possession of an under-tenant or servant is sufficient for the purpose.¹ But where a defendant, in expectation of a lease by indenture, which he agreed to take from the plaintiff, procured attornments from some of the tenants, and received rents from others, he was held liable to the plaintiff for use and occupation.² So where there is an agreement to demise a house for five years on a lease to be subsequently executed, under which the party enters and afterwards refuses to accept a lease, the owner may maintain this action; for taking the key of a house without a continued occupation is enough for the plaintiff.³ A lessor cannot maintain the action against an under-tenant as such.⁴ Nor can a husband be sued alone for the use and occupation of premises by his wife before marriage, as he never was in possession, even constructively.⁵ If there is no express agreement between the parties, and the law raises an implied contract for the payment of what the occupation is really worth, from the fact that the premises belonged to the plaintiff, the obligation is coextensive with

serted the premises, if the contract remains in force. *Westlake v. De Graw*, 25 Wend. 669.

¹ *Hall v. West. Tr. Co.*, 34 N. Y. 284; *Waring v. King*, 8 M. & W. 571; *Bull v. Sibbs*, 8 T. R. 327; *Jones v. Reynolds*, *supra*. And a plea of tender and profert is held conclusively to admit occupancy. *Currier v. Jordan*, 117 Mass. 260. Where it appeared that a third person was in fact the occupant, proof that the defendant had paid rent to the plaintiff during that occupancy was held to be presumptive evidence that the occupant held under the defendant, and in effect the same as an actual occupancy of the defendant. *Moffat v. Smith*, 4 N. Y. 126. Where the defendant agreed to rent a house, and sent in a woman to clean it, with workmen to paper one of the rooms, there was held to be sufficient evidence of occupation to go to the jury. *Smith v. Twoart*, 2 Mann. & G. 841; *Franklin v. Pewtress*, 43 Conn. 167.

² *Neal v. Swind*, 2 Cr. & J. 377.

³ *Little v. Martin*, 3 Wend. 219; *Grant v. Gill*, 2 Whart. 42; *Hemp hill v. Flynn*, 2 Pa. St. 144.

⁴ *McFarlan v. Watson*, 3 N. Y. 286.

⁵ *Richardson v. Hall*, 1 Br. & B. 50. Or where during coverture, or even after coverture, he has occupied with his wife the tenement of which she was lessee. *Whitney v. Dart*, 117 Mass. 153; and see *Knowles v. Hull*, 99 *id.* 562.

and measured by the enjoyment,—as soon as the occupation ceases, the implied contract ceases,—and as no express time is limited, the remuneration must necessarily accrue from day to day, and is not computed by the quarter.¹

§ 642. **Against Tenant holding over.**—Nor is the rule different upon a general holding-over, where there has been a tenancy at a specified annual rent, or upon an implied understanding;² or even if there was no express agreement as to the amount of rent to be paid,—for an agreement to pay what the premises are fairly worth will be implied, wherever a permissive holding is established.³ And the tenant is liable if the under-tenant holds over, though against his will; but he is only liable for the time the premises are held over, and not for the year's rent.⁴ If one of two joint-lessees holds over without the assent of the other, the latter is not liable in this action.⁵ And where a tenant from year to year, on the expiration of his landlord's title, continues in possession for one quarter, and pays rent for that quarter to the party entitled, but quits at the end of it, the payment is not evidence of a tenancy for more than a quarter.⁶ Where a tenancy is continued beyond the original term without any new arrangement, the jury may give the landlord a larger sum than the old rent, if there be circumstances to show that an increased rent was expected by him, and that the understanding was

¹ Per Denman, C. J., in *Gibson v. Kirk*, 1 Q. B. 856. There may, however, be a difference between the English rule—because their statute refers to *holding* and not merely to actual possession—and the American rule, as the statutes in this country generally refer only to the latter. See *Cleves v. Willoughby*, 7 Hill, 88, per Beardsley, J.

² *Stockett v. Watkins*, 2 Gill & J. 326; *Bishop v. Howard*, 2 B. & C. 100; *Bayler v. Bradley*, 5 C. B. 396.

³ *Hoskins v. Rhodes*, 1 Gill & J. 266; *Stockett v. Watkins*, *supra*. Where the tenant holding over used the premises for storage purposes only, they being fitted for use as a foundry and machine shop, he was held to pay rent as for a foundry and machine shop, since his occupation deprived the owner of the use. *Horton v. Cooley*, 135 Mass. 589.

⁴ *Ibbs v. Richardson*, 9 Ad. & E. 849; *ante*, § 24, and note.

⁵ *Christy v. Tancred*, 9 M. & W. 438; s. c. 12 *id.* 316.

⁶ *Freeman v. Jury, Mood. & M.* 19; *Waring v. King*, 8 M. & W. 571.

not repudiated by the tenant;¹ but, in general, the terms of the old tenancy will prevail. Thus an executor of a tenant from year to year, holding over and paying rent, will hold on the terms of the former demise, and be personally liable.²

§ 643. Against Assignees.—Executors or Administrators.—Partners.—This action will also lie against an assignee of the term; but where a tenant made a general assignment for the benefit of creditors, the lessor was not allowed to sustain this action against his trustees, without proving that they had actually occupied; and furthermore, that their merely putting persons upon the premises temporarily, to take care of the goods, was not such an occupation.³ If the lessee becomes bankrupt, the lessor may sue the assignees for use and occupation, if they actually occupy,⁴—but not otherwise.⁵ So the executors or administrators of the lessee are liable as such in this form of action; but they cannot be sued in their individual capacity, unless they have had an actual and beneficial occupation of the demised premises,⁶—and in that case the action will lie only against such of them as have so occupied.⁷ If partners become tenants, they all continue liable until the determination of the term, although one or more of them may have retired from the partnership before that time.⁸

§ 644. Not against Persons Occupying for Immoral Purpose.—As we have already had occasion to observe, if the premises are occupied for an immoral purpose, with the plaintiff's knowledge, the contract is void.⁹ In an action, however, brought for the use and occupation of certain premises where it was set up as a defence that the defendant was an infant

¹ Elgar *v.* Watson, 1 Car. & M. 494; Griffin *v.* Knisely, 75 Ill. 411.

² Buckworth *v.* Simpson, 1 Cr. M. & R. 834.

³ How *v.* Kennett, 3 Ad. & E. 659.

⁴ Gibson *v.* Courthorpe, 1 D. & R. 205; Naish *v.* Tatlock, 2 H. Bl. 320.

⁵ Clark *v.* Webb, 1 Cr. M. & R. 29.

⁶ Remnant *v.* Bremridge, 2 Moore, 94.

⁷ Nation *v.* Tozer, 1 Cr. M. & R. 172.

⁸ Christy *v.* Tancred, 7 M. & W. 127.

⁹ Girardy *v.* Richardson, 1 Esp. 13; and see *ante*, § 521.

and a prostitute, and had used the premises for the purposes of prostitution, the court held that this was no bar to the action, because both an infant and a prostitute must have lodgings.¹ But upon its being further proved that the lodgings were let to the defendant *for the purposes* of prostitution, and with a knowledge of the facts on the part of the plaintiff, the court decided that no rent could be recovered.²

§ 645. After Destruction of Premises by Fire.—Where premises have been rented for a certain term, the landlord may recover the rent accruing after the building shall have been burnt down, and is no longer inhabited by the tenant; for so long as the term continues the landlord cannot enter, even to rebuild, and the tenant must be considered as holding the land.³ But where there has been no express demise, and the premises were furnished apartments only, the defendant may give in evidence even under the general issue that they were wholly destroyed; and this will form a good defence to so much of the rent as accrued after the fire, since the subject-matter of the contract no longer exists. But this will not exonerate him from the payment of rent due up to that time.⁴ So where one was in possession under an oral agreement to purchase, which was defeated by the destruction of the tenement by fire, whereupon he vacated the premises, his implied tenancy at will and liability in an action for use and occupation were held to be likewise terminated.⁵

§ 646. Bad Condition of Premises not a Defence.—Recoupment.—The unhealthy or even untenable condition of the demised premises before or after the letting is no more a defence in this action than in an action for rent strictly such;

¹ Jennings *v.* Throgmorton, Ry. & M. 251.

² Crisp *v.* Churchill, 1 B. & P. 340; Jennings *v.* Throgmorton, *supra*; Appleton *v.* Campbell, 2 Carr. & P. 347.

³ Baker *v.* Holtzapffel, 4 Taunt. 45; Izon *v.* Gorton, 5 Bing. N. C. 501; *ante*, § 520. See also § 641, *supra*, and note, to the effect that the American law may differ on this point.

⁴ Packer *v.* Gibbins, 1 Q. B. 421.

⁵ Gould *v.* Thompson, 4 Met. 224.

and though the tenant neither has had nor could have a beneficial occupation of the tenement, he is liable if he had knowledge or means of knowledge of their condition.¹ If, however, the landlord is liable by the terms of the letting for the non-repair or improper condition of the premises, the tenant may avail himself of this liability by way of recoupment in reduction or extinguishment of the rent claimed.²

§ 647. Against Tenant abandoning.—This action will also lie against a tenant who quits the premises without any regular determination of the lease.³ It was accordingly held, in a case where the landlord had put up a bill in the window in the endeavor to relet the premises, that this act, because beneficial to the tenant also as well as to the landlord, was too equivocal to be held as amounting to a resumption, by the landlord, of the tenement demised.⁴

§ 648. Holding being ended by Landlord's Act, Action will not lie.—If, however, where the premises are demised for an express term and rent, the landlord, though with the tenant's consent, puts an end to the tenancy, or accepts a surrender of the tenement before the day on which the rent is payable, he cannot recover for the time the tenant actually remained in possession, for the rent, being entire, cannot be apportioned; nor in an action of use and occupation, for no implied contract

¹ Cleves *v.* Willoughby, 7 Hill, 83; Hart *v.* Windsor, 12 M. & W. 68; Surplice *v.* Farnsworth, 8 Scott, N. R. 307; Kirkman *v.* Jervis, 7 Dowl. 678; Collins *v.* Barrow, 1 Mood. & R. 112.

² *Ante*, § 374. But it was held in one case that a ruling that the tenant must show his damages from this cause in a cross action would not be disturbed, if it appeared clearly that he had not been aggrieved thereby. Westlake *v.* De Graw, 25 Wend. 669. See *ante*, § 382, as to when payment of rent is not excused by nuisance. In Maine, under R. S. c. 94, § 2, where a tenant under a verbal lease vacates without notice or consent, his liability for rent continues for whatever period may elapse before the tenancy becomes terminated by written notice, or until possession is accepted by the landlord. Rollins *v.* Moody, 72 Me. 185.

³ Mollett *v.* Brayne, 2 Camp. 103; Graham *v.* Whichelo, 1 Cr. & M. 188; Reeve *v.* Bird, 1 Cr. M. & R. 31.

⁴ Redpath *v.* Roberts, 3 Esp. 225; Selw. N. P. 1829; Oastler *v.* Henderson, 2 L. R. Q. B. Div. 575.

can arise where the express one is in force and not rescinded *ab initio*.¹ And such a surrender may result by operation of law from receiving the key, accepting a new tenant and the like, as well as by a deed or note in writing, in the mode required by the Statute of Frauds.²

§ 649. Eviction, Effect of on the Remedy.—If the rent be entire, that is, so much for the whole premises, and the landlord evicts the tenant from part of the premises, the tenant cannot be charged for the occupation of the part retained by him;³ but if after an eviction from part, by a title which is paramount to the lessor's, or if, being prevented from obtaining the whole of the premises, by a person holding a part under a prior lease, executed by the landlord, he still continues to occupy the residue,—he is chargeable, not on the agreement, but upon a *quantum meruit*, for the fair value of that portion which he retains.⁴ But while the premises are vacant by the landlord's expulsion of an under-tenant, or by the lessee's quitting on account of a nuisance caused or permitted by the landlord, or in consequence of the latter's misconduct, the tenant is not liable for rent.⁵ But the circumstance of the defendant having left, fearing a distress by the superior landlord, affords no defence to this action;⁶ nor is it a defence that the landlord has distrained goods to the full amount of the rent where he has sold them for less; because if he

¹ Hall *v.* Burgess, 5 B. & C. 332; Farson *v.* Goodale, 8 Allen, 202; Robinson *v.* Deering, 56 Me. 357. So Fuller *v.* Swett, 6 *id.* 219, n.; Nicholson *v.* Munigle, *id.* 215, where the lease was terminated between rent-days, in accordance with a power therein contained. See also Walls *v.* Atcheson, 3 Bing. 462; Whitehead *v.* Clifford, 5 Taunt. 518.

² Walls *v.* Atcheson, *supra*; *ante*, §§ 514, 515.

³ Smith *v.* Raleigh, 3 Camp. 513; Leishman *v.* White, 1 Allen, 489; Christopher *v.* Austin, 11 N. Y. 216; *ante*, §§ 315, 379; *post*, § 653.

⁴ Tomlinson *v.* Day, 2 Brod. & B. 680; Lawrence *v.* French, 25 Wend. 443; Fitchb. Man. Co. *v.* Melven, 15 Mass. 270; Pope *v.* Biggs, 9 B. & C. 252; Ludwell *v.* Newman, 6 T. R. 458. But the interference of a neighbor is no eviction. Johnson *v.* Oppenheim, 55 N. Y. 280.

⁵ Burn *v.* Phelps, 1 Stark. 94; *ante*, §§ 380, 381; Kirkman *v.* Jervis, 7 Dowl. 678.

⁶ Rickett *v.* Tullick, 6 C. & P. 66.

has sold them at too low a rate, the tenant's remedy is by action.¹

§ 650. **Rent ascertainable from Void Lease.** — In this action the plaintiff may resort to the original agreement, though void under the Statute of Frauds, for the purpose of ascertaining the amount of rent agreed to be paid.² But if no rent has been agreed upon, or if the agreement has fallen through, the measure of damages will be the true value of the premises, which should be proved.³ And although the plaintiff has not declared upon the agreement, and claims generally to recover for use and occupation, the defendant is not at liberty to give evidence of the value of the premises occupied, to reduce the recovery below the amount stipulated in such agreement.⁴ But where a lessee took a farm under an agreement which he never signed, and the terms of which the lessor himself omitted to fulfil, the court held that the jury were not bound to give a verdict for the amount of rent mentioned in the agreement, and might ascertain the annual value of the premises, by other evidence independent of the agreement, and gave their verdict accordingly.⁵ Interest is recoverable on all contracts for the payment of money, from the time when the principal ought to have been paid ; and whenever the sum to be paid for the occupation of premises, and the times when the payments are to be made are specified, the plaintiff is entitled to recover interest from those periods.⁶

§ 651. **Form of Declaring.** — **Action is transitory.** — The declaration is generally on the *indebitatus assumpsit* count ; but

¹ *Efford v. Burgess*, 1 Mood. & R. 23. An eviction may be proved under the general issue, and need not to be pleaded specially. *Prentice v. Elliott*, 5 M. & W. 606.

² *De Medina v. Polson*, Holt. 47; *Stover v. Cadwallader*, 2 Penny. (Pa.) 117.

³ *Tomlinson v. Day*, 2 Br. & B. 680.

⁴ *Jewell v. Schroeppel*, 4 Cow. 566; *Williams v. Sherman*, 7 Wend. 109.

⁵ *Tomlinson v. Day*, *supra*.

⁶ *Williams v. Sherman*, 7 Wend. 109; *Dorrill v. Stephens*, 4 McCord, 59.

may be in debt. The venue is always transitory ;¹ and it has been even held to lie for the use and occupation of lands in another State.² It must be averred in the declaration that the land was occupied by permission of the plaintiff, or at the request of the defendant.³ It need not, however, state the situation of the premises, or give any other local description of them.⁴ Nor is it necessary to state the particulars of the demise; or to describe the premises otherwise than generally,—as, divers messuages, lands, and tenements, or the like.⁵ But the mode of holding under the plaintiff must be described,—as, whether under himself alone, or as the survivor of another.⁶

§ 652. **Against Assignees of Bankrupt.**—In an action against the assignees of a bankrupt, the declaration stated that the defendants were indebted to the plaintiff in a certain sum of money for the use and occupation of a house, before that time occupied by the bankrupt *at the special instance and request* of the defendants. It was held that as the defendants could in this action be liable only for their own use and occupation or for that of another *at* their actual request, that these words were not formal, but of substance, and must be proved; the mere relation of assignees not making them personally liable for the occupation of demised premises by the bankrupt.⁷ In another case in *assumpsit* for use and occupation in a tenancy from year to year under an agreement at a fixed rate of rent, the declaration alleging a promise to pay during the tenancy, upon a plea of bankruptcy and occupation by the assignees during the period in which the rent accrued, it was held on demurrer that the bankrupt continued liable in this form of action by reason of his agreements,⁸ to the same ex-

¹ King *v.* Fraser, 6 East, 348; Kirtland *v.* Pounsett, 1 Taunt. 570.

² Henwood *v.* Cheeseman, 3 S. & R. 502; Egler *v.* Marsden, 5 Taunt. 25.

³ Bradley *v.* Davenport, 6 Conn. 1.

⁴ King *v.* Fraser, *supra*; Kirtland *v.* Pounsett, *supra*.

⁵ Wilkins *v.* Wingate, 6 T. R. 62. When the rent is payable in advance on the first day of the month, no demand on the day it falls due is necessary to support the action. Clarke *v.* Charter, 128 Mass. 483.

⁶ Israel *v.* Simmons, 2 Stark. 356.

⁷ Naish *v.* Tatlock, 2 H. Bl. 319.

⁸ Boot *v.* Wilson, 8 East, 311.

tent as it had already been decided that he remained liable for his obligations under seal in the shape of express covenants.¹

§ 653. Facts to constitute Defence. — The defendant may in this action, upon the plea of the general issue, give in evidence anything which proves that nothing is due,—as the delivery of corn or any other thing in satisfaction;² or, in fact, any matter which shows that the plaintiff *never* had a cause of action, or if he had, that matters have subsequently arisen which have avoided or discharged it.³ Thus the coverture,⁴ infancy,⁵ or duress of the defendant at the time of entering into the contract,⁶ may be taken advantage of under the plea of the general issue. So a release;⁷ accord and satisfaction; payment;⁸ or a former recovery for the same cause;⁹ and, in general, whatever shows that the plaintiff had no subsisting cause of action at the time when the suit was commenced.¹⁰ But a tender¹¹ and the Statute of Limitations must be specially pleaded;¹² and evidence of a set-off cannot be given without notice or plea.¹³ An eviction before the rent which is demanded became due is a good defence under the general issue; and a special plea to this effect would be bad on special demurrer, as amounting to the general issue.¹⁴ If he has been defrauded by the landlord, or evicted from part,

¹ *Auriol v. Mills*, 4 T. R. 94.

² *Paramore v. Johnson*, 1 Ld. Ray. 566.

³ *Sill v. Rood*, 15 Johns. 230; *Gleason v. Clark*, 9 Cow. 57.

⁴ *James v. Fowks*, 12 Mod. 101.

⁵ *Hartness v. Thompson*, 5 Johns. 160; *Wailing v. Toll*, 9 id. 141.

⁶ *Chitty, Plead.* 470. ⁷ *Brennan v. Egan*, 4 Taunt. 165.

⁸ *Bird v. Caritat*, 2 Johns. 346; *Martin v. Thornton*, 4 Esp. 181; *Drake v. Drake*, 11 Johns. 531.

⁹ *McDaniel v. Hughes*, 3 East, 378. If a lessor recovers judgment for part of a quarter's rent only, he cannot afterwards recover for the balance; the demand is entire and indivisible. *Warren v. Comings*, 6 Cush. 103.

¹⁰ *Sill v. Rood*, 15 Johns. 230. If a lessee fails to cultivate the whole of the land demised, and the lessor cultivates a portion of it, the lessee is entitled to a credit for the *pro rata* value of the portion cultivated by the landlord. *Calhoun v. Atchison*, 4 Bush, 261.

¹¹ *Wolcott v. Van Sanford*, 17 Johns. 253.

¹² *Gould v. Johnson*, 2 Ld. Ray. 838.

¹³ *Drake v. Drake, supra*; 2 N. Y. R. S. 355, § 19.

¹⁴ *Prentice v. Elliott*, 5 M. & W. 606.

it is a complete defence to the whole rent, and he need not abandon the residue.¹ So the defendant may plead that he assigned his interest in the demised premises to another, and that the plaintiff accepted such other person as tenant, in his stead ;² or, that being an under-tenant, and in order to protect his possession, he paid the rent, or a portion of it, to the superior landlord.³ The tenant may also prove, under the general issue, payments made to the mortgagee of the landlord's reversion after notice and demand.⁴ Bringing an ejectment will not be a bar to an action for use and occupation, for rent due before the day of the demise laid in the declaration in ejectment.⁵ In this action, where there has been a tenancy at a specified annual rent, and a holding-over, the tenant will be deemed to hold upon the terms under which he entered ; but he is not precluded by an agreement to pay a fixed sum for a term less than a year.⁶

§ 654. Defendant not to impeach Lessor's, but may set up his own, Title ; or Eviction. — The tenant is not permitted in this, or in any other action for rent, to impeach the lessor's title or right to demise at the time of making the lease ; nor can he set up an outstanding title against him. Hence, a plea of *nil habuit in tenementis* cannot be pleaded, even where the declaration does not state that the premises belonged to the plaintiff.⁷ But he may show that he has since become a purchaser of the reversion or of the lease, or that he has been evicted by a title paramount to that of the landlord ; for in either case

¹ *Ante*, §§ 315, 378, 649, and notes.

² *Turner v. Hardey*, 9 M. & W. 770.

³ *Sapsford v. Fletcher*, 4 T. R. 511; 1 Smith L. C. 73; *Peck v. Ingessoll*, 7 N. Y. 528.

⁴ *Waddilove v. Barnett*, 2 Bing. N. C. 538; *Salmon v. Matthews*, 8 M. & W. 827. But the doctrine of this case, that a payment on such a mere notice will, if specially pleaded, be a defence to the tenant against the mortgagor for rent then due and in arrear, is now overruled. See *ante*, § 120, note 3; and such notice without payment or attornment is no defence, even as to rent accruing due thereafter. *Whitmore v. Walker*, 2 Car. & K. 615.

⁵ *Birch v. Wright*, 1 T. R. 378; per Buller, J.

⁶ *Evertsen v. Sawyer*, 2 Wend. 507.

⁷ *Lewis v. Willis*, 1 Wils. 314; *Rennie v. Robinson*, 1 Bing. 147.

his obligation to pay rent would be extinguished.¹ And in a case where the tenant purchased the reversion of his landlord at a sheriff's sale, on an execution against the landlord, it was held that the interest thus acquired by the tenant extended to the whole of the demised premises, and that he might set it up in bar of a recovery for rent; but it was also held that where such interest includes only *part* of the demised premises, it operates only in *diminution of damages*, and the tenant may claim an apportionment of the rent.²

§ 655. Evidence to support the Action. — Almost any evidence which shows the relation of landlord and tenant to exist between the parties will support this action. It is not necessary for the plaintiff to prove an express contract with the tenant, when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied in all cases where a permissive holding is established.³ Even a parol lease, under which no act has been done by the lessee, who has constantly repudiated it, but who has, nevertheless, enjoyed the premises, may be treated by the lessor as a subsisting lease, upon which he may recover rent on a count for use and occupation.⁴ But where the plaintiff, in support of a general count of this description offered to prove the acknowledgment of the defendant that he hired and occupied the premises during the period in question, agreeing to pay therefor a certain sum; and it appeared that there was, during such period, an outstanding written agreement for a lease of the premises in the hands of the plaintiff, which, through failure of the event, on the happening of which it was to take effect, never became operative,—it was held, in the absence of evidence to show that such acknowledgment referred to the written agreement, that the evidence offered was inadmissible.⁵

¹ Cuthbertson *v.* Irving, 4 Hurlst. & N. 742.

² Nellis *v.* Lathrop, 22 Wend. 121; Rennie *v.* Robinson, *supra*; Osgood *v.* Dewey, 13 Johns. 240; Binney *v.* Chapman, 5 Pick. 124.

³ Stockett *v.* Watkins, 2 Gill & J. 326; Beverley *v.* Lincoln, 6 Ad. & E. 839, n.

⁴ Scott *v.* Hawsman, 2 McLean, 180.

⁵ Buell *v.* Cook, 5 Conn. 206; Gale *v.* Nixon, 6 Cow. 445.

SECTION IV.

OF A SUIT IN EQUITY FOR RENT.

§ 656. Generally, when Equity will decree Payment of Rent.

— Another remedy for the collection of rent is by a suit in equity. Before the statutes enlarging the remedies for rent in arrear, it was often necessary to go into a court of equity, in cases of rent-seck, for suitable redress. These statutes, as we have seen, give the same remedies in cases of rent-seck, as in those of rent-service, or a rent-charge. There are still, however, many cases where a resort to a court of equity may be proper, and even necessary,—as, where no remedy at law to meet the exigency of the case exists, or, if it exists at all, is found to be imperfect, inconvenient, or doubtful. Thus in a case of rent-seck, where the grantee never had any seisin, and cannot, consequently, recover at law, a court of equity will decree a seisin, and order the rent to be paid.¹ Or, if the deeds by which a rent is created are lost, so that it is uncertain what kind of rent it was;² or, if there is such a confusion of boundaries that the lands out of which it issues cannot be exactly ascertained;³ or, any perplexity or uncertainty as to the title, or the extent of the defendant's liability exists.⁴ So, where the days on which the rent is payable are uncertain; or a distress is obstructed or evaded by fraud.⁵ If a lease of

¹ Fonbl. on Equity, book i. ch. 3, § 3; Armstrong *v.* Gilchrist, 2 Johns. Cas. 424; Rathbone *v.* Warren, 10 Johns. 587; King *v.* Baldwin, 17 *id.* 384. These observations will not, of course, be understood as applying to those tribunals which have blended powers of law and equity.

² Collett *v.* Jacques, 1 Ca. in Ch. 120; Cox *v.* Foley, 1 Vern. 359; Lawrence *v.* Hammitt, 3 J. J. Marsh. 287.

³ Leeds *v.* New Radnor, 2 Bro. Ch. 338, 518; Benson *v.* Baldwyn, 1 Atk. 598; North *v.* Stafford, 3 P. Wms. 148.

⁴ Livingston *v.* Livingston, 4 Johns. Ch. 287. On a bill in equity for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the rent; it was held that this was the subject of a legal set-off. Townraw *v.* Benson, 3 Madd. 203.

⁵ Holder *v.* Chisbury, 3 P. Wms. 256; Dawson *v.* Williams, 1 Freem. Ch. 99.

an incorporeal thing is assigned, and the assignee enjoys it, he will be decreed in equity to pay rent, though not bound in law; and if an assignee of a term rendering rent assigns over, the lessor may collect rent from the first assignee, so long as he held the land, although he may have no remedy at law for those arrears.¹

§ 657. Specific Cases in which Payment may be decreed.—Where a *terre-tenant* of lands liable for a rent-charge has suffered the rent to be in arrear, his executor will be compelled in equity to pay the same, although his testator was not personally bound for the rent, which was recoverable only by distress; for his personal estate has been increased by the non-payment.² So it has been held that a *cestui que trust* of a lease rendering rent will, in equity, be obliged to pay the rent during the time wherein he has taken the profits, if his trustee (the lessee) has become insolvent.³ Although a grantee of a rent cannot have a remedy in equity, merely for the want of a distress, yet, if the want of such distress be caused by the fraud, or other default, of the tenant, he will be relieved in equity.⁴ Or if rent is settled upon a woman by way of jointure, but she has no power of distress, or other remedy at law, payment of the rent will be decreed in equity according to the intent of the conveyance.⁵ And if a person is grantee of an entire rent, issuing out of a manor, and there are no demesne lands on which to distrain, payment of rent will be decreed in equity.⁶ Courts of equity have also extended their

¹ Com. Dig. Chancery, 4 N. 1, Rent; London *v.* Richmond, 2 Vern. 423; Valliant *v.* Dodemedé, 2 Atk. 546.

² Eton College *v.* Beauchamp, 1 Ca. in Ch. 121.

³ Clavering *v.* Westley, 3 P. Wms. 402. But this case is overruled in Walters *v.* North Coal Mining Co., 5 De G. M. & G. 629. And in Bochering *v.* Katz, 37 N. J. Eq. 150, it is held, distinguishing Clavering *v.* Westley, since the relation between the owner and occupant of land is of a purely legal nature, that the fact that a lessee takes a lease for an unnamed principal, but in his own name, will not render the principal liable in equity for the rent. In this case the complainant sought equitable relief on the ground that there were no parties chargeable at law.

⁴ Davy *v.* Davy, 1 Ca. in Ch. 144.

⁵ Mitf. Eq. Pl. 115; Champernoon *v.* Gubbs, 2 Vern. 382.

⁶ Leeds *v.* Powell, 1 Ves. Sr. 171.

aid to cases where bills have been filed for discovery and relief, and the discovery is essential to the plaintiff's relief, the defendant admitting the plaintiff's right to the rent; for in such case the relief may be consequent upon the discovery, and the court having obtained jurisdiction for the purpose of the discovery will retain it, in order to carry out the relief.¹ Another case occurs where an apportionment of rents among a variety of parties may be required, in order to obtain complete justice among them.² So, where there are several persons claiming the same rent of a tenant, being in privity of contract or of tenure, he may file a bill of interpleader to compel them to ascertain to whom it rightfully belongs,—as, in the cases of a mortgagor and mortgagee, trustee and *cestui que trust*, or where the estate is settled to the separate use of a married woman, of which the tenant has notice, and the husband has been in the receipt of the rent; or in any similar case, where the tenant does not dispute the landlord's title, but puts himself on the mere uncertainty of the person to whom the rent is payable.³ But if a mere stranger sets up a claim to the rent by a title paramount, he is not in privity of contract or of tenure, and the tenant owes him no debt or duty, and is not consequently entitled to a bill of interpleader.⁴

§ 658. Cases of Mutual Accounts.—Discovery.—Where there are mutual accounts between a landlord and tenant, extending over a number of years, with stipulations in the lease requiring expenditures on one side and allowances on the other, and any of such claims are controverted, a court of equity is often necessary, and always proper, to adjust the rights of the respective parties.⁵ But it does not appear to be necessary that there should be mutual accounts between the parties, in order

¹ Story Eq. Pl. § 311, &c.; *Livingston v. Livingston*, *supra*.

² *North v. Strafford*, *supra*; *Benson v. Baldwyn*, 1 Atk. 598.

³ *Crawshay v. Thornton*, 7 Sim. 391; *Badeau v. Tylee*, 1 Sandf. Ch. 270.

⁴ 2 Story, Eq. Jur. § 812; *Dungey v. Angove*, 2 Ves. 304, 310; *Clarke v. Byne*, 13 id. 383.

⁵ *Porter v. Spencer*, 2 Johns. Ch. 171; *Hawley v. Cramer*, 4 Cow. 727; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Rex v. Whitstable Fishermen*, 7 East, 353; *O'Connor v. Spaight*, 1 Sch. & L. 305.

to give jurisdiction to this court; for it will take cognizance of a case where the accounts are to be examined on one side only, and a discovery is wanted in aid of the account.¹ So where a recovery is had in ejectment, and the plaintiff is afterwards prevented from enforcing his judgment by an injunction on a bill filed by the tenant, who dies before the bill is finally disposed of,—in such case, the remedy at law by an action of trespass for mesne profits is gone by the death of the tenant, since actions of tort do not survive at law; but a court of equity will entertain a bill for an account of mesne profits, in favor of the plaintiff in ejectment, against the personal representatives of the tenant; because it would be inequitable that his estate should receive the benefits and profits of the property of another person.²

§ 659. **Against Under-tenants. — Relief when refused.** — Mr. Justice Story, in his admirable treatise on Equity Jurisprudence, illustrates the beneficial effect of this jurisdiction in equity by reference to the case of an under-tenant who, although he is liable to be distrained for rent during his possession, is not liable to be sued for rent on the covenants of the lease, there being no privity of contract between him and the lessor. But if the lessee becomes insolvent, and unable to pay the rent, the under-tenant will not be permitted to enjoy the possession and profits of the estate without accounting for the rent to the original lessor. And although he has no remedy at law, a court of equity will relieve the lessor, and direct a payment of the rent to him, upon a bill making the original lessee and the under-tenant parties; for if the original lessee were compelled to pay the rent, he would have a remedy over against the under-tenant. And in equity the rent seems to be a trust, or charge upon the estate; and the lessee is bound, at least in conscience, not to take the profits without a due discharge of the rents out of them.³ But equity

¹ *Post v. Kimberly*, 9 Johns. 470, 493; *Barker v. Dacie*, 6 Ves. 687; *Frietas v. Dos Santos*, 1 Younge & J. 574.

² *Bp. of Winchester v. Knight*, 1 P. Wms. 407; *Lansdowne v. Lansdowne*, 1 Madd. 116, 138.

³ *Fonbl. Eq. B. 1, c. 5, § 5*; *Goddard v. Keate*, 1 Vern. 87; 1 Story, Eq. Jur. § 687.

will not grant a remedy beyond what, by analogy to the law, ought to be granted. As, if a rent be charged on land only, the party who comes into possession of it will not be personally charged with its payment, unless there be some fraudulent attempt on his part to remove the stock, or he do some other thing to evade the right of distress.¹ Nor will a man be relieved if he becomes remediless at common law by his own negligence,—as, if he loses his deed, unless it appears that it was once in his custody and he has been deprived of it by some casualty or misfortune; or if he destroys his remedy of distress, and cannot have debt for the arrears, it being due out of a freehold. Neither will it relieve him, in cases proper for law, against his mispleading, or where there is a neglect and want of a plea, or if no proper plea was put in,—for it was his own fault.²

§ 660. Account for Rents and Profits.—Equity will not relieve for mesne profits, unless in case of a trust, or an infant, where no entry was made by the person entitled to the mesne profits.³ And in decreeing an account of mesne profits where the plaintiff has been prevented from asserting his title by infancy, a trust, or fraud, it will direct such account to be taken from the time the plaintiff's title accrued until special circumstances require that such account should commence from the time of entry, or of filing the bill.⁴ But it is said that, in taking an account of rents and profits, even in the most favored cases, interest is seldom allowed, especially if the sum be small or uncertain.⁵ The cases decreeing an account of rents and profits where the legal title is not previously established, proceed upon that respect which in justice is due to the interest of persons who, by fraud, infancy, or otherwise, have been prevented from pursuing their legal

¹ Thorndike *v.* Allington, 1 Ca. in Ch. 79; Palmer *v.* Whettenhal, *id.* 184; 1 Fonbl. Eq. B. 1, c. 3, § 3.

² 1 Fonbl. Eq. *supra*; Blackhall *v.* Combs, 2 P. Wms. 70.

³ Owen *v.* Aprice, 1 Ch. R. 17; Haiton *v.* Simpson, 2 Vern. 724; Norton *v.* Frecker, 1 Atk. 524; 1 Story, Eq. Jur. § 689.

⁴ Dormer *v.* Fortescue, 3 Atk. 130.

⁵ Batten *v.* Earnly, 2 P. Wms. 163; Drapers' Co. *v.* Davis, 2 Atk. 211; Tew *v.* Winterton, 1 Ves. 451.

rights. But it must not be inferred, from the anxiety of courts to protect such rights, that they will at any period, or under any circumstances, exercise such indulgence; for if an infant neglect to enter within six years after he comes of age, he is as much bound by the Statute of Limitations from bringing a bill for an account of mesne profits as he is from an action of account at common law.¹ So, if there be a verdict at law against an infant's title, a court of equity will not direct an account of mesne profits, but will merely entertain the bill for the purpose of giving the infant an opportunity to establish his title at law.² But if the plaintiff has been kept out of possession by fraud, equity will interfere at any distance of time; since no length of time will bar a fraud, of which the party affected by it was not apprised.³

SECTION V.

THE ACTION OF COVENANT.

§ 661. Lies on Agreements under Seal.—The action of covenant is a remedy to recover damages for the breach of a covenant or agreement under seal, whether the covenant is express, or implied, or is contained in a deed-poll or an indenture.⁴ It is the appropriate remedy wherever the liability is created by an agreement under seal; but if the law creates the liability independently of the covenant, an action on the case may also be maintained.⁵ It is the usual remedy on leases at the suit of the lessee, his executor, or assignee, against the lessor, for the breach of a covenant for quiet enjoyment and the like; and by the lessor and his assigns, against the lessee and his assigns, upon the various covenants

¹ *Lockey v. Lockey*, Prec. Ch. 518; *Davey v. Davey*, 1 Ca. in Ch. 144.

² *Newbergh v. Bickerstaff*, 1 Vern. 295.

³ *Cottrell v. Purchase, Forrest*, 63.

⁴ *Gale v. Nixon*, 6 Cow. 445; *Grannis v. Clark*, 8 *id.* 36; *Saltoun v. Houston*, 1 Bing. 433.

⁵ *Lucky v. Rowzee*, 1 A. K. Marsh. 295. See *Powers v. Ware*, 2 Pick. 451.

usually entered into by him, and which have been treated of in a former part of this work.¹

§ 662. Lies after Lessor's Assignment.—Alternative with Debt, when.—Where the demand is for rent or other liquidated sum, the lessor may proceed either in debt or covenant against the lessee, unless he has accepted the assignee as his tenant; but after an assignment, the lessee is only liable in an action of covenant, and then only upon his express covenant, and not upon a covenant in law.² As against the lessee, however, the plaintiff has his election either to bring an action upon the covenant or to sue for the debt, making the occupation the cause of action.³ A lessor may bring covenant after his re-entry for non-payment of rent which accrued previous to the re-entry;⁴ but if there has been an eviction from part of the land by paramount title, the lessee cannot be sued in covenant, but only in debt, for his liability arises on his personal covenant, which cannot be apportioned.⁵

§ 663. Lies for Unliquidated Damages.—Includes General Damages.—An action of covenant is the peculiar remedy for the breach of a covenant where the damages are unliquidated, and depend for their amount upon the opinion of a jury.⁶ And

¹ Spencer's Case, 5 Co. 16, b; Congdon *v.* Read, 7 R. I. 576; Congham *v.* King, Cro. Car. 221; Keeling *v.* Morrice, 12 Mod. 371; Hyde *v.* Dean of Windsor, Cro. El. 553.

² March *v.* Freeman, 3 Lev. 383; Thursby *v.* Plant, 1 Wms. Saund. 241, n. 5; Ludford *v.* Barber, 1 T. R. 92; Brett *v.* Cumberland, Cro. Jac. 523. Byron *v.* Johnson, 8 T. R. 410; Campion *v.* Crawshay, 6 Taunt. 356.

³ Ten Eyck *v.* Houghtaling, 12 How. Pr. R. 523.

⁴ Hartshorne *v.* Watson, 5 Scott, 506.

⁵ Stevenson *v.* Lambard, 2 East, 575. But see Mayor *v.* Thomas, 10 Q. B. D. 48, where Lord Ellenborough's statement in Stevenson *v.* Lambard, that "in covenant between lessor and lessee, where the action is personal, and on mere privity of contract, . . . the rent is not apportionable," is said to be *obiter dictum*; and it was further held that St. 32 Henry VIII. c. 34 gives the lessor's reversioner the lessor's rights to sue, and transfers the privity of contract; and that the covenant is therefore divisible, so that the assignee may sue in respect of his own interest.

⁶ Richards *v.* Killam, 10 Mass. 243, 247; Schack *v.* Anthony, 1 M. & S. 573; Morison *v.* Kymer, 3 Camp. 549, n. a; Smith *v.* Stewart, 6 Johns. 46.

it is more advisable to proceed in covenant on a lease for general damages than to declare in debt for a penalty securing the performance of such covenant; because if the party elects to proceed for the penalty, he is precluded from afterwards suing for general damages, and he cannot, in case of further breaches, recover more than the amount of the penalty; but if he proceeds in covenant for every repeated breach, he may ultimately recover damages beyond the amount of the penalty. So, where rent is due upon a lease, and there has been another breach,—as, for not repairing,—for which the plaintiff claims unliquidated damages, covenant is preferable to debt, because the former action will embrace both causes of action, and damages for the whole demand may be recovered. Where, however, only a specific sum is sought to be recovered, debt is preferable to covenant; because, in case of judgment by default, the judgment is final in the first instance, unless it be for a penalty; in which case, as we shall see presently, the damages must be assessed under the statute. And if the breach of covenant amounts to a *tort*, the party has an election to proceed by action of covenant, or on the case for the tort, as against a lessee, either during his term or afterwards, for waste.¹

§ 664. Lies only in Favor of Owner of Legal Interest.—
Joinder of Plaintiffs.—This action lies only in favor of a person who is party to the covenant,—in the name of the covenantee, who holds the legal interest, and not of the person who is only beneficially interested; nor can such third person be joined in the action.² And, therefore, where an attorney who had been authorized by a landlord in writing to execute a lease on his behalf signed and sealed it in his own name, but the covenants by the lessee were with the landlord by name, it was held that the landlord could not sue upon such covenants.³ Where there are several covenantees, they must

¹ *Kinlyside v. Thornton*, 2 W. Bl. 1111.

² *Wolfe v. Washburn*, 6 Cow. 261; *Jenkins v. Morton*, 3 T. B. Monr. 28; *Strohecker v. Grant*, 16 S. & R. 237; *Southampton v. Brown*, 6 B. & C. 718; *Smith v. Emery*, 7 Halst. 53; *How v. How*, 1 N. H. 49. See *ante*, § 258, and notes.

³ *Berkeley v. Hardy*, 5 B. & C. 355.

join if their interest is joint, although the covenant be several.¹ but if their interests are several each may sue, although the covenant be joint.² If one of several joint covenantees be dead, the survivor must sue and aver the death in his declaration;³ or if one named in the indenture omitted to seal it, this must be averred.⁴

§ 665. By Tenants in Common of the Reversion, how brought.

— Tenants in common of a reversion may maintain covenant against the assignee of a term for rent in arrear, although it should appear that, at the time of suit brought, the reversion was out of the plaintiffs, they having granted it over after the rent became due.⁵ For arrears of rent due, or for breaches of covenant (even on covenants running with the land), which occur prior to the assignment of the reversion, the action must be brought in the name of the assignor, and not of the assignee, as a *chose in action* cannot be assigned at law;⁶ and the assignor or lessor cannot, after a grant of the reversion, sue for breaches of covenant subsequently committed, or for rent subsequently due, as the right of action is in the assignee.⁷ But the assignor may, after assignment, sue for rent due before, as by the assignment it is severed from the inheritance, and does not pass to the assignee;⁸ and though the assignee of the reversion cannot sue for breaches of covenant, which were prior to the assignment, yet he may sue for any continuance of the breach after the assignment, as such continuance furnishes a fresh cause of action.⁹

¹ *Montague v. Smith*, 13 Mass. 405; *Eccleston v. Clipsham*, 1 Saund. 153; *Anderson v. Martindale*, 1 East, 497; *Petrie v. Bury*, 3 B. & C. 353.

² *Slingsby's Case*, 5 Co. 18; *James v. Emery*, 8 Taunt. 245; *Southcote v. Hoare*, 3 *id.* 87. See *ante*, § 264, and notes.

³ *Scott v. Godwin*, 1 B. & P. 67.

⁴ *Vernon v. Jefferys*, 2 Stra. 1146.

⁵ *Midgleys v. Lovelace*, 12 Mod. 45.

⁶ *Lewes v. Ridge*, Cro. El. 863; *Kingdon v. Nottle*, 4 M. & S. 53; *Canahan v. Rush*, 8 Taunt. 227; *Flight v. Bentley*, 7 Sim. 149.

⁷ *Kane v. Sanger*, 14 Johns. 89; *Beely v. Parry*, 3 Lev. 154; *Webb v. Russell*, 3 T. R. 394; *Thursby v. Plant*, 1 Wms. Saund. 241, d.

⁸ *Flight v. Bentley*, *supra*.

⁹ *Mascal's Case*, 1 Leon. 62.

§ 666. **Requisites to maintain.** — **When Assumpsit lies.** — To sustain this action the defendant must have executed the covenant, but not the plaintiff, unless perhaps when the instrument is one *inter partes*.¹ Where a lease has been assigned by a deed-poll, subject to the covenants, and the assignee breaks them, the lessor's remedy is *assumpsit*; as the assignee, in such case, does not execute the deed.² But an assignee of the reversion cannot maintain this action on the covenants in the lease if the lessor has not executed it; because, in that case, no reversion vests in the assignee to which the covenants may attach.³ At common law, besides the actual parties to the covenant, their heirs also might sue, though not named in the lease, if they succeeded to the reversion; but only upon covenants running with the land and for breaches occurring or continuing after the ancestor's decease.⁴ By the statute 32 Hen. VIII. c. 34, and other enactments *in pari materia*, as we have seen, the same remedies are given to the assignee of the reversion.⁵

§ 667. **When to be brought by the Executor.** — But the executor alone can sue for an eviction in the ancestor's lifetime, because the estate is reduced thereby to a mere right of action for damages before the heir's title accrues.⁶ So also for a breach of the covenants of seisin or against incumbrances, because these are broken, if at all, when they are made, and nothing but a personal right of action passes to the covenantee.⁷ On the same ground, an assignee cannot sue upon the covenants of seisin and against incumbrances,⁸ nor upon

¹ The prevailing doctrine is that an action of covenant does not lie against a lessee by deed-poll. See *ante*, §§ 250 and 259, note 3.

² *Burnett v. Lynch*, 5 B. & C. 589; *Trustees v. Spencer*, 7 Ohio, 493.

³ *Cardwell v. Lucas*, 2 M. & W. 111; *Cooch v. Goodman*, 2 Q. B. 580.

⁴ *Lougher v. Williams*, 2 Lev. 92; *Vivian v. Campion*, Salk. 141; *Doe v. Rogers*, 2 Nev. & M. 550.

⁵ *Ante*, §§ 439-441.

⁶ *Lucy v. Levington*, 2 Lev. 26.

⁷ *Hamilton v. Wilson*, 4 Johns. 72; *Bennet v. Irwin*, 3 id. 363; *Mitchell v. Warner*, 5 Conn. 497, 504; *Davis v. Lyman*, 6 id. 254; *Marston v. Hobbs*, 2 Mass. 439; *Chapman v. Holmes*, 5 Halst. 20; *Birney v. Hann*, 3 A. K. Marsh. 324.

⁸ *Mitchell v. Warner*, *Hamilton v. Wilson*, *supra*. But this doctrine

covenants running with the land for breaches occurring before the assignment.¹ But where an assignee is as such entitled to sue, the executor of an assignee may maintain the action; for the word "assignee" includes assigns at law as well as by deed.² A covenantee cannot sue for a breach occurring after he has assigned; but if a grantee of land assigns it with a warranty, he may sue the grantor for such a breach, because he is liable on his warranty to indemnify his assignee.³

§ 668. Against Joint, and Joint and Several Covenantors.—This action lies only against the party who has executed the instrument;⁴ where there are several covenantors, they must all be joined as defendants, where the covenant is joint and not several; but if they covenant jointly and severally, they may either be joined as defendants or sued separately, at the option of the covenantee.⁵ If the action be brought upon a covenant which is merely implied from a demise, it must be brought against that party only who in law is deemed to have demised, although others may have joined in the lease by way of confirmation.⁶ On a joint covenant by two, if one die, the survivor only can be sued at law;⁷ and if both die, the representative of the survivor.⁸ If the covenant is joint, and is broken by the *tort* of one of the covenantors, the other covenantor cannot be charged with this breach, but the covenant will for this purpose be taken as several, and the wrong-doer can alone be sued.⁹ But a covenantor cannot, by adopting an act which he did not previously direct, make himself liable as

does not prevail in England and in some of the United States, the covenants there being viewed as continuing. See *ante*, § 263, note.

¹ *Greenly v. Wilcocks*, 2 Johns. 1; *Lewes v. Ridge*, Cro. El. 863.

² *Chapman v. Dalton*, Plowd. 284; *Spencer's Case*, 5 Co. 17, a.

³ *Kane v. Sanger*, 14 Johns. 89; *Williams v. Wetherby*, 1 Aik. 233; *Bickford v. Page*, 2 Mass. 455; *Niles v. Sawtell*, 7 *id.* 444.

⁴ *Wilson v. Brechemin*, Bright, 445; *Trustees, &c. v. Spencer*, 7 Ohio, 151.

⁵ *Thomas v. Pyke*, 4 Bibb, 418; *Enys v. Donnithorne*, 2 Burr. 1190; *Lilly v. Hodges*, 8 Mod. 166; *Northumberland v. Errington*, 5 T. R. 522.

⁶ *Smith v. Pocklington*, 1 Cr. & J. 445.

⁷ *Bundy v. Williams*, 1 Root, 543.

⁸ *Ayer v. Wilson*, 2 Rep. Con. Ct. 319.

⁹ *Coleman v. Sherwin*, 1 Salk. 137.

for a breach of covenant.¹ This action will lie against the heirs on a covenant by his ancestor for himself and his heirs; but the plaintiff must aver that they were expressly bound by the deed;² and if the heir has no lands by descent, he may plead it in defence of the action.³

§ 669. Executors and Administrators, how bound.—When personally liable.—Executors and administrators are bound by the covenants of their testator or intestate, although not named;⁴ unless the covenants are such as in their nature terminate by the death of the covenantor, or are to be performed by him personally;⁵ and if in possession, may be sued as assignees, for they are assignees in law, of the interests of the termor.⁶ But for a breach committed in the time of the testator, the judgment must be *de bonis testatoris*; for it is the covenant of the testator, which binds the executors as representing him; and therefore he must be sued in that name.⁷ An agent, attorney, executor, administrator, or trustee, who covenants in his own name, although he describes himself as agent, attorney, executor, &c., is personally liable on his covenant; for the addition to his name is merely descriptive, and he can only bind his principal by making the covenant in the name of the principal.⁸ We have before seen to what extent the assignee of the lessee is liable upon covenants, depending, in cases where the assignee is not named, on the privity of estate which subsists between the lessor and the lessee and his assigns, in respect to the reversion.⁹ But this is a liability which attaches only to the assignee of a legal estate, and not

¹ Griffiths *v.* Brome, 6 T. R. 66.

² Lawrence *v.* Buckman, 3 Bibb, 23.

³ Gifford *v.* Young, 1 Lutw. 287; Dyke *v.* Sweeting, Willes, 585.

⁴ Van Rensselaer *v.* Platner, 2 Johns. Cas. 17; Lee *v.* Cooke, 1 Wash. 306; Harrison *v.* Samson, 2 *id.* 155.

⁵ Hyde *v.* Dean of Windsor, Cro. El. 553; Townsend *v.* Morris, 6 Cow. 123.

⁶ Machin *v.* Molton, 1 Ld. Ray. 453; Montague *v.* Smith, 13 Mass. 405.

⁷ Collins *v.* Thoroughgood, Hob. 188.

⁸ Duvall *v.* Craig, 2 Wheat. 45; Thayer *v.* Wendell, 1 Gallis. 37; Stone *v.* Wood, 7 Cow. 453; Stinchfield *v.* Little, 1 Greenl. 231.

⁹ *Ante*, § 444.

to the devisee of an equity of redemption, which only amounts to an assignment of an equitable interest, and does not include the whole legal estate.¹

§ 670. Venue.—Form of Declaring.—The rules relating to the *venue* in an action of debt heretofore noticed when treating of that action are applicable to the action of covenant, and need not be repeated here. The declaration must state that the contract was under seal;² it should also make *proferit* thereof, or show some excuse for the omission.³ Only so much of the deed or covenant should be set forth as is essential to the cause of action, and each may be stated according to the legal effect, though it is usual to declare in the words of the deed;⁴ and the breach may negative the condition generally, or according to its legal effect.⁵ Several breaches may be assigned at common law, and damages, being the object of the action, should be laid sufficient to cover the real amount.⁶ For non-payment of rent, it is sufficient to allege that the plaintiff on such a day and year, and at such a place, by a certain indenture made between himself of the one part and the defendant of the other (which the defendant brings here into court), demised to the defendant "*certain premises particularly mentioned and described in the said indenture*" (instead of setting out the parcels), except as is therein excepted, to hold the same to the defendant, except, &c., "*for a certain sum therein mentioned, and still unexpired;*" yielding the rent, &c., payable, &c., and then state the covenant for payment of the rent, the

¹ Mayor *v.* Blamire, 8 East, 487.

² Van Santwood *v.* Sandford, 12 Johns. 197; Moore *v.* Jones, 2 Ld. Ray. 1536.

³ Cutts *v.* U. S., 1 Gallis. 69; Read *v.* Brookman, 3 T. R. 151.

⁴ Moore *v.* White, 6 Littell, 151; Macon *v.* Crump, 1 Call, 575; Buster *v.* Wallace, 4 Hen. & M. 82.

⁵ Marston *v.* Hobbs, 2 Mass. 433; Abbott *v.* Allen, 14 Johns. 248.

⁶ Dummer *v.* Birch, Comyn, 146; Bristow *v.* Wright, Doug. 667; Harris *v.* Mantle, 3 T. R. 307. The true way of declaring upon a deed of demise is to set out that part of the lease only which is necessary to entitle the plaintiff to recover, with such other parts as may qualify those necessary parts,—such, for instance, as contain conditions precedent or the like,—and to state no more of the covenants than those on which breaches are assigned.

entry of the defendant, and the breach in not paying so much rent due. Or, if the action be for the breach of any other covenant, the plaintiff need only state "at a certain rent payable by the defendant to the plaintiff, as in the said indenture is mentioned," and then set forth those covenants and the breach of them.¹

§ 671. Covenants secured by Bond.—We have seen that a covenantor may require a bond as additional security for the performance of covenants. Platt on Covenants notes a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election, to bring an action of debt for the penalty (after which he cannot resort to the covenant, because the penalty is a satisfaction for the whole);² or if he does not choose to go for the penalty, he may proceed upon the covenant, and recover more or less than the penalty *toties quoties*.³ The practice of taking a bond for performance of covenants has some advantages; for, on a breach of covenant the bond becomes absolute, and the penalty an immediate debt, and consequently confers on the obligee, through the medium of the statute, the power of attaching the lands in the hands of a devisee, for satisfaction in damages for the covenant broken. But where a lessor takes a bond of this description, he will generally find

¹ *Thursby v. Plant*, 1 Wms. Saund. 233, a. Implied covenants may be declared on, as if they were expressed in the lease, for such is the effect of the lease. *Grannis v. Clark*, 8 Cow. 36. Where the plaintiff declares upon a demise by himself, he is not obliged to set out any title to the lands demised, but may begin his declaration with stating that "whereas by a certain indenture, &c., he *demised*," &c. But in an action by an assignee of the reversion, he must set out the title of the lessor to the premises, that it may appear he had such an estate in the reversion as might be legally assigned to the plaintiff. And, although the entry of the lessor into the demised premises is usually averred, yet such averment is unnecessary, for he is liable in debt or covenant for rent, by virtue of the contract, if he has not entered; and so is the assignee of the lessee. Neither is such averment necessary in an action of covenant by the assignee of the reversion, to whom the privity of contract is transferred by the statute. *Bellasius v. Burbiche*, 1 Ld. Ray. 170; *Walker v. Reeves*, Doug. 461, n. 1.

² *Bird v. Randall*, 3 Burr. 1345.

³ *Lowe v. Peers*, 4 Burr. 2228.

it more advantageous to sue on the covenants contained in the lease for general damages than to proceed on the bond for the penalty; because, by adopting the latter course, he is precluded from afterwards suing on his covenant; and as he can never recover on the bond an amount exceeding the penalty, he may be ultimately left, on future breaches, without the means of redress; whereas, he may proceed on his covenant for breaches *toties quoties*; and may recover damages far exceeding the amount of the penalty.¹

§ 672. Judgment and Execution in Action on Bond.—The inconveniences attending bonds of this nature, and the hardship of enforcing payment of the whole penalty, however disproportioned to the actual damage sustained by the obligee was at one time seriously felt,—although a court of equity might always afford relief by preventing the collection of more than was sufficient to make full compensation for the damage,—and gave rise to the statute of 8 & 9 Will. III. c. 11, which has been in substance re-enacted in most of the United States. It is provided hereby that if a breach is proved, judgment shall be entered for the penalty of the bond, but execution shall only issue for the amount of the actual damage proved; and that the judgment shall stand as security for further damages sustained by want of due performance of the covenant secured by the bond, to be made available by *scire facias*.²

§ 673. Sum fixed considered as Penalty or Damages.—Still, however, the question may arise whether the sum fixed is to be considered in the nature of a penalty, or as liquidated damages. If a penalty, and the lessor proceeds, upon a breach of the covenant, to collect it at law, equity will interfere, direct an issue to ascertain the amount of damages, and compel the lessor to take only so much as will compensate him for the breach of the covenant. As, if a tenant should covenant, under a penalty, not to plough certain lands, the lessor will not be allowed to recover more than the actual damages he may sus-

¹ Platt, Covenants, 548; Adams *v.* Essex, 1 Bibb, 149; Astley *v.* Wel-don, 2 B. & P. 346.

² 2 N. Y. R. S. 378, §§ 6-15; Mass. Pub. Stat. c. 171.

tain if the tenant does plough.¹ Yet if the act to be done is single, as to pay a certain additional sum for every acre converted into tillage, that sum may be recovered as liquidated damages.² But an agreement to perform certain work by a limited time, under a certain penalty, is not to be taken as liquidated damages which the party is to pay for the breach of his covenant, but is in the nature of a penalty.³ And the court will look into extrinsic circumstances, for the purpose of determining whether the sum mentioned is intended for a penalty, or as liquidated damages.⁴ The statute is calculated to protect covenantors against the payment of further sums than are in conscience due, and also to take away the necessity of proceeding in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued.⁵ It is highly remedial in favor of defendants, and the plaintiff cannot refuse to proceed according to its provisions.⁶ Before the statute, the plaintiff could assign only one breach on the bond; for, by assigning several breaches the declaration was objectionable on the ground of duplicity, because the bond was forfeited by the breach of one covenant as well as of several.⁷

§ 674. Breach of Covenant, how assigned. — In assigning the breach of a covenant, it may be done according to the substance, and need not be in the letter of the covenant.⁸ It is

¹ *Lowe v. Peers*, *supra*; *Sloman v. Walter*, 1 Bro. C. C. 418: *Barrett v. Blaggrave*, 5 Ves. 555.

² *Farrant v. Olmius*, 3 B. & A. 692; *Denton v. Richmond*, 1 Cr. & M. 734. Upon a covenant not to plough up an ancient meadow, and if he does, to pay an additional rent per acre, it was held that the increased rent was not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties; and, therefore, a court of equity ought not to interpose in an action brought for its recovery. *Rolfe v. Peterson*, 2 Bro. P. C. 436. See also *Bowers v. Nixon*, 13 Jur. 334.

³ *Tayloe v. Sandiford*, 7 Wheat. 13.

⁴ *Perkins v. Lyman*, 11 Mass. 76; s. c. 9 *id.* 522.

⁵ *Hardy v. Bern*, 5 T. R. 636; *Mackworth v. Thomas*, 5 Vcs. 331.

⁶ *Dragg v. Brand*, 2 Wils. 377; *Roles v. Rosewell*, 5 T. R. 538; *Walcott v. Goulding*, 8 *id.* 126.

⁷ *Symms v. Smith*, Cro. Car. 176; *Barnard v. Michel*, 1 Vent. 114, 126.

⁸ *Potter v. Bacon*, 2 Wend. 583.

in general sufficient, where the covenant is in the affirmative, to negative its performance in the words of the covenant. But the rule will not apply where this mode of pleading does not necessarily amount to a breach; for, on a covenant to indemnify the plaintiff, the breach must show how he was damnified. So on a covenant for quiet enjoyment, the declaration must show how, and by whom, the plaintiff was disturbed in his possession.¹ And when a covenant is in the alternative, to do one or the other of two things, the breach must show that the party has done neither. But in assigning the breach of a covenant for quiet enjoyment, the plaintiff need not set out the title of the person who entered upon him, because he is supposed to be a stranger to it; it is sufficient to allege generally, that he had a lawful title before or at the time of the conveyance to the plaintiff.² An assignment of a breach of covenant, although in the words of the covenant, has been held ill upon a demurrer to the defendant's plea, because it did not show any particular act of the plaintiff, or in what respect he had refused to act, which amounted to a breach of his covenant. And the defective assignment was not cured by pleading over a set-off of a demand (claimed in a different right from that in which the plaintiff sued, who was an administratrix) to a declaration in covenant for unliquidated damages.³ But, in general, the breach may, as we have said, be assigned according to the substance and legal import, though not according to the letter, of the covenant.⁴

§ 675. Negative Covenant, Breach of, how assigned. — Where the covenant is in the negative, the declaration in assigning the breach must state specifically what the defendant has done in breach of his covenant. Great certainty, however, is not in general required in stating this, as the acts or omissions

¹ *Brown v. Stebbins*, 4 Hill, 154; *Harris v. Mantle*, 3 T. R. 307; *Randal v. Ches. & Del. Canal Co.*, 1 Harringt. 151; *Rickert v. Snyder*, 9 Wend. 416; *Marston v. Hobbs*, 2 Mass. 433.

² *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. E. Ind. Co.*, 8 *id.* 278.

³ *Warn v. Bickford*, 7 Price, 550.

⁴ *Potter v. Bacon*, 2 Wend. 583; *Abbott v. Allen*, 14 Johns. 248; *Marston v. Hobbs*, *supra*; *Salman v. Bradshaw*, Cro. Jac. 304.

alleged are within the defendant's own knowledge.¹ Certainty to a common intent will be sufficient; as where a man covenants for himself and his assigns to pay rent, it is sufficient to say that he did not pay it, without negativing a payment by his assigns.² But where the breach states the act of a third party as the cause of the infringement complained of, it must be stated with certainty. If, for instance, in an action upon a covenant for quiet enjoyment, the breach state an eviction, and leave it uncertain whether the evicting party claimed adversely to the covenantor, it will be bad; it should state that the party had lawful title before and at the time of the grant to the plaintiff; otherwise, if the breach be general and unqualified, it will be presumed that the title of the evicting party was derived from the plaintiff himself.³ Rent is recoverable by way of liquidated damages, upon a covenant by the lessee to pay a certain additional rent for every acre converted to tillage; and the receipt of the original rent, without demanding the additional sum, will not be a waiver of it.⁴ No demand of rent is necessary to be proved in this action.⁵

§ 676. Defendant's Plea of Performance.—There is strictly no plea of the general issue in this action, for *non est factum* only puts in issue the fact of sealing the deed, so *non infregit conventionem* and *nil debet* are insufficient pleas; and therefore most matters of defence must be specially pleaded.⁶ Where the breach is assigned generally, by merely negativing the words of the covenant, a plea of performance, pursuing in the like general manner the words of the covenant, is good.⁷ But where the particular facts which constitute the breach

¹ Gale *v.* Reed, 8 East, 85.

² Bull. N. P. 164; Archer *v.* Marsh, 6 Ad. & E. 959.

³ Brookes *v.* Humphreys, 5 Bing. N. C. 55.

⁴ Denton *v.* Richmond, 3 Tyrw. 630; Jones *v.* Green, 3 Younge & J. 298; Farrant *v.* Olmius, 3 B. & A. 692.

⁵ McMurphy *v.* Minot, 4 N. H. 251.

⁶ Barney *v.* Keith, 6 Wend. 555; Mar. Ins. Co. *v.* Hodgson, 6 Cranch, 206; Legg *v.* Robinson, 7 Wend. 194; 2 Com. Dig. Pleader, 4; Hodgson *v.* E. Ind. Co., 8 T. R. 283.

⁷ Abbott *v.* Allen, 14 Johns. 248.

are stated, a plea of performance should meet those facts, and answer them specifically.¹

§ 677. For Rent. — Tenant's Plea of Eviction. — To an action of covenant for rent, as in the action of debt, the lessee may plead that he was *evicted* by the lessor from the demised premises, and kept out of possession until after the rent in question became due; for an eviction occasions a suspension of the rent,² although a mere trespass will not.³ If a tenant would excuse himself from payment of rent, upon an eviction by a stranger, he must show that the stranger had a good title to evict him; and in order to give the plaintiff an opportunity of controverting such title, the defendant must show how it arises; for if it were sufficient to allege generally that the stranger had a good title, a single issue could not be taken on it; and as the legality, as well as the fact of title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court alone; in order therefore to avoid this inconvenience, the title should be specified.⁴

§ 678. On Covenant for Quiet Enjoyment. — Ouster to be Alleged. — A tenant cannot maintain an action for a breach of a covenant for quiet enjoyment, although he has been proceeded against in trespass by a third person claiming title,

¹ Bradley *v.* Osterhoudt, 13 Johns. 404; Postmaster-Gen. *v.* Cochran, 2 *id.* 416. In Pennsylvania, under a plea of performance, with leave to give in evidence anything that amounts to a legal defence, the defendant may prove any matter that he might have pleaded specially. Webster *v.* Warren, 2 Wash. C. C. 456; Bender *v.* Fromberger, 4 Dall. 439. On such a plea, the defendant has a right to open and close. Norris *v.* Ins. Co. of N. A., 3 Yeates, 84. It admits the execution of the instrument, and assumes the proof of performance. Harrison *v.* Park, 1 J. J. Marsh. 172; Roth *v.* Miller, 15 S. & R. 105; Barrett *v.* Crutcher, 3 Bibb, 202. But in Alabama, a plea of payment, or of performance, does not admit the deed, and the plaintiff must prove his cause of action as if no such plea had been filed. Bryant *v.* Simpson, 3 Stew. 339.

² Fitchb. Man. Co. *v.* Melven, 15 Mass. 258; Dalston *v.* Reeve, 1 Ld. Ray. 77; Dyett *v.* Pendleton, 8 Cow. 727.

³ *Ante*, § 309, n. 5.

⁴ Per Ld. Hardwicke, in Jordan *v.* Twells, Ca. temp. Hardw. 172.

and a recovery has been had against him, unless in his action the tenant avers and proves that such third person, before or at the date of the covenant, had lawful title, and by virtue thereof entered and ousted him.¹ It is, however, not necessary for the tenant to state all the facts constituting an eviction in his action for breach of the covenant of quiet enjoyment, but a declaration setting forth such facts generally would be good.²

§ 679. Partial Eviction, when a Defence. — Although a partial eviction by the lessor suspends the whole rent, it is no answer to a breach of other covenants in the lease,—at least until it be shown that the party elected to give up the residue of the premises.³ Against the assignee of a term, though an eviction of three-eighths of the estate has taken place, the defendant is not entitled to ask for an apportionment of rent, under a general plea denying his holding as assignee. Such relief can only be had by pleading the facts specially, and not in bar of the whole action.⁴ If the defendant be charged with a breach of covenant for non-payment of rent, and he shall have surrendered his estate after some part of the rent became due, he cannot plead his surrender in bar of the whole action; for the breach is not entire, but the plaintiff may recover by proving part of it.⁵

§ 680. Plea of Assignment. — An assignee who is chargeable only in respect of his privity of estate may show that, before the rent became due, or before a breach of the covenant occurred, he assigned the estate, and so discharged himself.⁶ And where, to a plea of this kind, the plaintiff replied that in and by the indenture the lessee, for himself, his executors, administrators, and assigns, covenanted not to assign without the consent of the lessor, and that no such consent was

¹ *Webb v. Alexander*, 7 Wend. 281. See *ante*, § 308.

² *Rickert v. Snyder*, 9 Wend. 416; *McGeehan v. McLaughlin*, 1 Hall, 33.

³ *Browne, Actions*, 354; *ante*, § 378, n. 4.

⁴ *Lansing v. Van Alstyne*, 2 Wend. 561.

⁵ *Barnard v. Duthy*, 5 Taunt. 27.

⁶ *Pitcher v. Tovey*, 1 Show. 340; *ante*, §§ 452, 453.

given,—the replication was holden bad, because the action was founded on the privity of estate, which was destroyed by the assignment; and the proper remedy for the plaintiff was by action on the covenant not to assign.¹ The lessee is always liable upon his covenant, notwithstanding his assignment; but if sued *in debt*, he may show that he has assigned with the assent of the landlord, either expressly, or as implied by his recognition of the assignee as his tenant.² But he cannot plead to covenant for rent an assignment and tender by an unaccepted assignee.³

§ 681. Payment after Rent-day not a Defence.—Exception.—Discharge of Covenant.—In debt, where the plaintiff seeks to recover the rent itself, it is sufficient to show payment after the day on which it became due, or that the lessor distrained upon him, and so satisfied his demand;⁴ but these defences are not available in covenant, because here the plaintiff seeks damages for the defendant's breach of covenant, and the plea would, in itself, amount to an admission that he had broken it.⁵ In any form of action, however, an under-tenant may show that before the rent became due, the superior lord or the grantee of a rent-charge threatened to distrain for rent due from the lessee, and that he paid the rent to save his own goods.⁶ It must appear to have been a compulsory, and not a mere voluntary, payment; but it will not be the less compulsory that the landlord on demanding it allows the occupant time to pay.⁷ Covenants may sometimes also be discharged by parol upon a good consideration.⁸ So an action for a breach of covenant may be barred by a note accepted in satisfaction of the breach.⁹ But a negotiable note with sureties

¹ *Paul v. Nurse*, 8 B. & C. 486.

² *Marrow v. Turpin*, Cro. El. 715; *ante*, § 620.

³ *Orgill v. Kemshead*, 4 Taunt. 642; *ante*, § 620.

⁴ *Dyer*, 20, b; *Cecil v. Harris*, Cro. El. 140.

⁵ *Hare v. Savill*, 1 Brownl. 19; *Warner v. Theobald*, Cowp. 588.

⁶ *Sapsford v. Fletcher*, 4 T. R. 511; *Cobb v. Carpenter*, 2 Camp. 13, n.; *Taylor v. Zamira*, 6 Taunt. 524.

⁷ *Carter v. Carter*, 5 Bing. 406; *Pope v. Biggs*, 9 B. & C. 245.

⁸ *Barnard v. Darling*, 11 Wend. 28; *Marks v. Robinson*, 1 Bailey, 89.

⁹ *Moody v. Leavitt*, 2 N. H. 171.

taken by a landlord after making a distress, for the amount claimed as rent payable in sixty days, under an agreement to relinquish the distress, and not re-enter or distrain within the sixty days, is only a collateral security, and not a payment or satisfaction of the rent, inasmuch as the note did not appear to be taken in *absolute payment*,—it appearing also that the note had not been paid or negotiated by the landlord, and that, therefore, all his remedies were open independent of the note.¹

§ 682. Damages not to be Set off.—May be Recouped.—**Statute of Limitations. — Bankruptcy.**—In an action for rent by the lessor, the defendant cannot *set off* damages that he may be entitled to recover against the lessor on covenants contained in the same indenture on which the action is brought;² but we have seen in what cases, and to what extent, a tenant may *recoup* himself for payments made by him on the lessor's account, or for damages he may have sustained by the lessor's failure to perform his covenants.³ The Statute of Limitations does not apply to actions on specialties of this description; nor will an action for a breach of covenant for title be barred by the bankruptcy and certificate of the covenantor, although the cause of action accrued before the bankruptcy.⁴ And where the assignee of a term of years covenants to perform all the covenants in the lease on the part of the lessee to be performed, in an action of covenant by the lessor or assignor against him for rent due and unpaid to the original lessor, it is not necessary to allege that the plaintiff has been obliged to pay the rent to the lessor, or that he has been

¹ *Cornell v. Lamb*, 20 Johns. 407; *Warren v. Forney*, 13 S. & R. 52. Even though secured by a mortgage. *Lofsky v. Maujer*, 3 Sandf. 69 Bac. Abr. 82; *Howland v. Coffin*, 9 Pick. 52, where it was held to be a question for the jury whether, under the circumstances of the case, the notes given were intended as payment of the rent.

² *Tuttle v. Tompkins*, 2 Wend. 407.

³ *Ante*, §§ 374, 630.

⁴ *Hammond v. Toulmin*, 7 T. R. 612; *Mills v. Auriol*, 1 H. Bl. 433; *ante*, § 457. An insolvent's discharge is no bar to an action on an express covenant to pay rent brought to recover rent accruing subsequent to the discharge. *Lansing v. Prendergast*, 9 Johns. 127; *Auriol v. Mills*, 4 T. R. 94; *Stinemets v. Ainslie*, 4 Den. 573; and see *ante*, §§ 456, 457.

damnfified ; for such an assignee will continue liable, although he may have assigned over the lease before any rent became due to one who has been accepted by the lessor as his tenant, and *non damnificatus* is, therefore, no answer to the declaration ; for the covenant, being express and positive, is broken by the rent remaining unpaid.¹ A recovery in an action on a covenant against incumbrances, and an assessment of nominal damages merely because the covenantee had not removed the incumbrance, is no bar to another action to recover the actual damage suffered to extinguish the incumbrance.²

§ 683. Dependent Covenants. — Performance of, by the Plaintiff, essential. — Where covenants are dependent, it is a good plea in bar that the party seeking performance has not performed or offered to perform the covenants on his part,³ although it is otherwise where the covenants are independent.⁴ Thus the lessor's covenant to find timber was held a condition precedent to lessee's covenant to repair, and performance of the former should have been averred in the declaration.⁵ To an action for not repairing the premises, the tenant may show that the lessor was bound to furnish him with timber or other materials for the repairs, and that he has neglected or refused to do so ; but a plea that the landlord did not assign him materials is bad, for he should have shown that he asked ; or that there were none proper to which he had a right is also bad, for this puts the issue upon a point of law, and not a matter of fact.⁶

§ 684. Assignments, how proved. — The execution of a lease and the possession of the premises by the defendant is evidence sufficient *prima facie* to charge him as assignee for the non-payment of rent, although it is not conclusive.⁷ But if

¹ Port *v.* Jackson, 17 Johns. 239, 479.

² Donnell *v.* Thompson, 1 Fairf. 170.

³ Parker *v.* Parmele, 20 Johns. 130.

⁴ McCampbell *v.* Miller, 1 Bibb, 453; Webster *v.* Warren, 2 Wash. C. C. 456.

⁵ Thomas *v.* Cadwallader, Willes, 496.

⁶ Brailsford *v.* Parsons, 1 Lutw. 308.

⁷ Williams *v.* Woodard, 2 Wend. 487; Lansing *v.* Van Alstyne, *id.* 563.

the issue is made up on the question whether the defendant holds as assignee, the plaintiff must prove the assignment to the defendant.¹ Where the breach is specially assigned, and the proof alleged to be by deeds and records, they are to be shown on oyer.² On a plea of performance the defendant assumes the burden of proof, and is therefore entitled to open and close the case.³ Upon a breach assigned that the defendant had not used the premises in a husbandlike manner, but, on the contrary, had committed *waste*, an issue was taken that the defendant had not committed waste. At the trial the plaintiff offered evidence to show that the defendant had not used the premises in a husbandlike manner, which did not, however, amount to waste; but the judge rejected the evidence, being of opinion that on this issue it was not competent for the plaintiff to prove anything which fell short of waste, and the opinion was afterward confirmed by the court.⁴

§ 685. When Equity will relieve Covenantee.—A court of equity will not, in general, decree the specific performance of a covenant, but leaves the party to his damages in an action at law.⁵ But under some circumstances, as where a tenant is about to do an act against which he has expressly covenanted, this court will restrain him by injunction.⁶ It is only, however, where the legal remedy is inadequate or defective that equity interferes; as, where a defect is discovered in the title, which can be supplied by the grantor, the grantees may file a bill in equity for a specific performance of the covenant for further assurance. And a grantor under this covenant will be compelled to convey a title he may have subsequently acquired, though he purchased such title for a valuable consideration.⁷ Although equity cannot specifically enforce a

¹ *Lansing v. Van Alstyne, supra*; *Quackenboss v. Clarke*, 12 *id.* 555.

² *Wilford v. Rose*, 2 *Root*, 172. ³ *Scott v. Hull*, 8 *Conn.* 296.

⁴ *Harris v. Mantle*, 3 *T. R.* 307.

⁵ *Flint v. Brandon*, 8 *Ves.* 159; *Eagle F. I. Co. v. Cammet*, 2 *Edw.* 128; *Dean of Ely v. Stewart*, 2 *Atk.* 44; *Lucas v. Comerford*, 1 *Ves.* 235; *Errington v. Aynesly*, 2 *Bro. C. C.* 341; *Hill v. Barclay*, 16 *Ves.* 405.

⁶ *Barret v. Blagrave*, 5 *Ves.* 555.

⁷ *Taylor v. Debar*, 1 *Ca. in Ch.* 274, 2 *id.* 212; *Seabourne v. Powell*, 2 *Vern.* 11.

covenant to rebuild unless its terms are clearly defined, yet when the agreement is so distinct that the court can describe the building, as a subject for the report of a master, specific performance will be decreed.¹ If a covenant is broken by a tenant, the landlord may often indulge his caprice, and even malice, against the tenant, without his having any certain relief; but, as a general rule, equity will not enforce a covenant embracing a hard bargain, and at law there can be no damage without an injury.² But there are many cases of covenant broken in which the recovery of damages at law, however large in amount, would never be a compensation to the party aggrieved. Hence has arisen the system of preventive justice administered in a court of equity, by means of injunction to restrain breaches of covenant. This opens a wide field of learning, which we do not intend to enter upon, having already touched upon it in treating of the respective covenants of the parties, to which the reader is referred. A very frequent cause of its application, however, occurs in the prevention of waste, which subject we have next to discuss.

SECTION VI.

ACTIONS FOR WASTE.

§ 686. When and by whom maintainable.—At common law, an action of waste may be maintained by a reversioner, to recover damages for voluntary waste committed by a tenant during his occupation.³ But it could only be brought by him who was entitled to the immediate reversion of the premises

¹ *Mosely v. Virgin*, 3 Ves. 184.

² *Doe v. Phillips*, 9 Moore, 46; *Doe v. Watt*, 8 B. & C. 308.

³ *Greene v. Cole*, 2 Wms. Saund. 252, n. (7); *Jefferson v. Bp. of Durham*, 1 B. & P. 120. The nature of waste is discussed under the head of the covenant to repair, *ante*, §§ 345–356. In Indiana judgment of forfeiture and eviction for waste is only to be given in favor of the reversioner against the tenant when the injury to the estate in reversion is equal to the value of the tenant's estate or unexpired term, or is done maliciously. R. S. 1881, § 28G; *Bollenbacker v. Fritts*, 98 Ind. 50.

at the time when the waste was committed ; and for the want of this privity of estate, the assignee of the reversion could not sue for waste done previous to the assignment.¹ The reversioner must also have had an estate of freehold in himself ; for, as waste is an injury to the inheritance, a tenant for years could not maintain an action for waste.² And it was punishable only against three classes of persons, guardian in chivalry, tenant in dower, and tenant by the curtesy ; but not against a tenant for life or years,— for the reason, as Lord Coke says, that the law which created the former of these estates and interests provided a remedy itself against waste, but left the owners of the land, who created the others, to provide a remedy for themselves in their demise.³ The statute of Gloucester⁴ extended the protection of the writ of waste to tenants for life and for years ; and directed that the tenant should forfeit the place wasted, with treble damages.⁵

§ 687. **Action on the Case for Waste.**—The common-law action of waste, however, has fallen into disuse, having given way to an action on the case, in the nature of waste, which is now the ordinary means of recovering damages against a tenant for *voluntary* waste.⁶ And in this form of action the

¹ Co. Lit. 53, a; Greene *v.* Cole, 2 Wms. Saund. 235, n. (2); Carris *v.* Ingalls, 12 Wend. 70; McLaughlin *v.* Long, 5 Har. & J. 113; Robinson *v.* Wheeler, 25 N. Y. 252.

² McLaughlin *v.* Long, *supra*.

³ Co. Lit. 145; 2 Bl. Com. 282.

⁴ 6 Edw. I. c. 5. In Parrott *v.* Barney, Deady, 405, this statute is held to be part of the American common law.

⁵ By statute in New York, 1 R. S. 750, § 8, an action of trespass is given to the remainder-man or reversioner mediate, as well as immediate, against any tenant for life or years, whether by operation of law or by grant, even though he has conveyed the estate away, if he is still in possession, and the reversioner's action is not bound by his assignment before suit brought; and an heir may sue for waste in his ancestor's lifetime. By the code a civil suit is substituted for the action of waste; §§ 450, 451. The judgment is for forfeiture and treble damages. Co-tenants may sue each other, but the judgment is for treble damages, or for partition at the plaintiff's election.

⁶ Queen's College *v.* Hallett, 14 East, 489. In an action to recover damages for waste, the jury, in determining the amount of damages, are to inquire how far the acts of the defendant have injured the plaintiff's

reversioner, or remainder-man in fee, for life, or for years, may recover damages, either against his tenant or a stranger, for an injury to the reversion;¹ and although the lease may contain a covenant against waste, he is not obliged to sue upon the covenant, but may elect to bring either covenant or case. The action lies against a tenant by sufferance or for years, although holding over after notice to quit.² But against a tenant at will, trespass, and not case, is the proper remedy.³

§ 688. Assumpsit. — Case, concurrent with Covenant. — Though *assumpsit* is the usual remedy against a tenant for not cultivating land according to the course of good husbandry, or for not repairing, yet for voluntary waste, and particularly where there has been any conversion of trees or other property, case is frequently preferable; and this, it has been held, is a concurrent remedy with covenant, where there has been voluntary waste. And if a tenant does any act which is injurious to the reversion, the landlord may bring his action for damages during the term, even although the tenant may have it in his power to restore the premises to their original state before its expiration.⁴ A tenant for years, or from year to year, was formerly held liable for *permissive waste*;⁵ but estate and inheritance. And in doing so, they are not limited to the value or market price of wood and timber actually cut and removed; but should also consider the effect which the cutting of it has had upon the place alleged to be wasted. *Harder v. Harder*, 26 Barb. 409.

¹ *Greene v. Cole*, 2 Wms. Saund. 252, d, note; *Elwes v. Mawe*, 3 East, 38. The provisions of the N. Y. R. S. 750, § 8, giving the reversioner or remainder-man an action of waste or trespass, notwithstanding any intervening estate for life or years, authorizes only waste against a tenant, and trespass against a stranger; it does not give waste against a stranger. *Livingston v. Haywood*, 11 Johns. 429; *Bates v. Shraeder*, 13 id. 260. An action on the case in the nature for waste lies against an assignee of the lease. *Short v. Wilson*, *id.* 33.

² *Kinlyside v. Thornton*, 2 W. Bl. 1111.

³ *West v. Treude*, Cro. Car. 187; *Salop v. Crompton*, Cro. El. 777; Co. Lit. 57, a; *Goodright v. Vivian*, 8 East, 190; *Attersoll v. Stevens*, 1 Taunt. 194.

⁴ *Queen's College v. Hallett*, *supra*.

⁵ *Thursby v. Plant*, 1 Wms. Saund. 233, b, n. 7. The tenant for years is liable to an action for even permissive waste. *White v. Wagner*, 4 Harr. & J. 373.

the later cases hold that he is in neither case liable for mere permissive waste, unless the lease contains a covenant to repair on his part.¹

§ 689. Common Law Action for, Personal.—Executors and Administrators, how Chargeable for.—The common-law action cannot be maintained against an executor, for waste committed by a testator in his lifetime; because waste is a tort, and the cause of action is strictly personal, which, in the language of the law, dies with the person.² The executors and administrators of a tenant for years, however, are punishable for waste committed by themselves, while in possession of the land, as other persons are. And if, by the commission of waste by a testator, his personal estate has been benefited, his executors will be chargeable for it at common law, to the value of the property, in an action for money had and received.³ Every lessee, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land, by whomsoever committed; and if done by a stranger, he is still bound to answer, and must take his remedy over.⁴ And if one of two joint tenants commits waste, it is waste by them both; but when treble damages are imposed by any statute, they are only recoverable against the person who actually committed the waste.⁵

§ 690. Equitable Remedy in New York.—By statute in New York, the common-law court in which the action for waste is pending has equity powers to enjoin and punish by attachment the defendant, if he commits waste pending the suit.⁶

¹ *Gibson v. Wells*, 4 B. & P. 290; *Wise v. Metcalfe*, 10 B. & C. 312.

² But the Revised Statutes of New York provide a remedy in such cases; for any person, or his personal representatives, may have actions of trespass against the executor or administrator of any testator or intestate, who, in his lifetime, shall have wasted, destroyed, or carried away the chattels of any such person, or committed any trespass on the real estate of any such person. 2 R. S. 114, § 5.

³ *Hambly v. Trott*, Cowp. 376; *Moore v. Townshend*, 33 N. J. 284.

⁴ *Cook v. Champl. Tr. Co.*, 1 Den. 91; *Attersoll v. Stevens*, 1 Taunt. 196.

⁵ *Greene v. Cole*, 2 Wms. Saund. 259, b. ⁶ 2 R. S. 333, §§ 18, 20.

The effect of this provision is to give the common-law courts the same power to *restrain and prevent waste*, in cases of this kind, which has formerly been exercised by the Court of Chancery alone. The common law remedies, however, are still so inadequate, as well to prevent waste as to give redress for waste already committed, that they have, in a great measure, given way to the remedy by bill in equity, which is so much more easy, expeditious, and complete, that it is almost invariably resorted to. By such a bill, not only may future waste be prevented, but an account may be decreed, and compensation given for former waste. Besides, as we have seen, an action on the case will not lie at law for permissive waste; but in equity an injunction will be granted to restrain permissive as well as voluntary waste.¹ This course of proceeding is also open to many persons who could not take advantage of the legal remedies; and an injunction will be granted, though no action at law can be maintained against the tenant; nor is it necessary in any case that there should be a suit pending.²

§ 691. Injunctions to prevent Waste.—A landlord need not wait until waste is actually committed; for if he ascertains that the tenant is about to commit any act which would operate as a *permanent injury* to the estate, the court will interfere and restrain him from doing such act. And whether he begins, or threatens, or shows an intention to commit waste, an injunction will be granted.³ A court of equity will also grant an injunction to restrain the tenant from doing a certain act,

¹ *Caldwall v. Baylis*, 2 Mer. 408; 2 Story, Eq. Jur. 179; Anon., 1 Ves. 93. In *Watson v. Hunter*, 5 Johns. Ch. 169, the Chancellor stated the general rule to be that an injunction would be confined to restrain future waste, as an action of trover would lie for what had been cut.

² *Kane v. Vanderburgh*, 1 Johns. Ch. 11. It is scarcely possible to estimate the injury which the destruction of a few valuable timber-trees, by a tenant for life on a farm with a scanty stock of wood and timber, may occasion to the owners of the inheritance. Hence bills to restrain waste of this character are not to be frowned upon by the court. *Per Sandford*, V. Ch., in *Sarles v. Sarles*, 3 Sandf. Ch. 601.

³ *Gibson v. Smith*, 2 Atk. 182; *Mayor v. Hedger*, 18 Ves. 355; *Kington v. Eve*, 2 Ves. & B. 349; *Caldwall v. Baylis*, *supra*.

whether it amounts to waste or not, provided it be directly contrary to the tenant's own covenant, or even in contravention of an agreement which may be inferred from the course of dealing between the parties.¹ In a case where a tenant from year to year, having received notice to quit, was proceeding to take away the crops, manure, &c., contrary to the usual course of husbandry, and to cut and damage the hedge-rows, &c., the Chancellor granted an injunction, observing that the principle applied equally to the case of a tenancy from year to year, as to a lease for a longer term.² And where the tenant, in revenge of the landlord's having distrained on him, threatened to sow the land with mustard-seed, which is very injurious to the soil, and requires many years to eradicate, the court granted an injunction to prevent him.³ In another case, where the tenant cut timber and firewood from the estate for the purpose of selling it, thus abusing his privilege of taking only such reasonable firewood as was necessary for his own use, the court granted an injunction to prevent him from proceeding any further.⁴ So, where the defendant had a lease for four years of certain land, the principal value of which consisted in pine timber growing thereon, and was proceeding to cut large quantities of it, and saw it up in his mills, he was restrained from cutting any more, or from removing that already cut down.⁵

¹ Grey de Wilton *v.* Saxon, 6 Ves. 106; Onslow *v.* ——, 16 *id.* 173. Upon a covenant not to plough up any ancient meadow, and if he does, to pay an additional yearly rent per acre; held, that the increased rent was not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties; and therefore a court of equity ought not to interfere in an action for its recovery. Rolfe *v.* Peterson, 2 Bro. P. C. 436.

² Onslow *v.* ——, *supra*. See also Pulteney *v.* Shelton, 5 *id.* 147; Lathrop *v.* Marsh, *id.* 260.

³ Pratt *v.* Brett, 2 Madd. 62. A lessee, in addition to a reserved rent, covenanted to pay a penal rent for pasture-land broken up or used or converted to any other use than for meadow-land. It was doubted whether using the land for a race-course and ground for training horses, was a breach of the covenant, and therefore held that this was a question for a jury, and not determinable by the court on demurrer. Aldridge *v.* Howard, 4 Mann. & G. 921.

⁴ Courtown *v.* Ward, 1 Sch. & L. 8; Bonnett *v.* Sadler, 14 Ves. 526.

⁵ Watson *v.* Hunter, 5 Johns. Ch. 169. But where, by the terms of

§ 692. **Remedies in Special Cases.**—If a lessor *excepts the trees* in his lease, the lessee is not entitled to take the usual estovers, and, in such case, the technical action of waste will not lie against the tenant for cutting trees, because they are not parcel of the thing leased, but trespass will be the appropriate remedy.¹ As a tenant for life or for years has no property in timber-trees, though he has a special interest in the fruit and shade, as long as they are annexed to the land,² he will be restrained from cutting timber, even where there is a demise of a farm expressly including the trees; for though there is no express exception as to the cutting, the law makes the exception, and the lessee cannot cut them down, because he has but a limited interest.³ And where a lease contained a covenant not to *convert* any meadow-land, with other usual covenants in the lease of a farm, showing clearly the nature of the lease to be for the purpose of tillage as a farm; Lord Eldon granted an injunction to restrain the defendant, a tenant to the plaintiff, from breaking up meadow for the purpose of building, *contrary to the covenants of his lease*.⁴ At a later period, also, he granted an injunction to restrain a tenant from committing waste by ploughing up pasture-land, although there was no express covenant not to convert pasture into arable land, on the ground that a covenant contained in the lease, to manage pasture in a husbandlike manner, was equivalent to it.⁵ So if a tenant takes a lease of lands adjoining his dwelling-house, and, with the consent of the lessor, throws part of the demised premises into his ornamental grounds, going to considerable expense in permanent improvements, by planting and otherwise; though the lessor may have reserved, in the amplest manner, all trees and shrubs that may be planted on the premises, yet after having his lease, the tenant is bound to bring uncleared lands into cultivation, he will not be restrained from cutting timber for that purpose. *McDaniel v. Callan*, 75 Ala. 327.

¹ *Vin. Abr. Waste (M.)*, pl. 26.

² *Herlakenden's Case*, 4 Co. 62; *Dyer*, 90.

³ *Herring v. Dean of St. Paul's*, 2 Wils. Ch. 11; *Liford's Case*, 11 Co. 46; *Dyer*, 37.

⁴ *Grey de Wilton v. Saxon*, 6 Ves. 106.

⁵ *Drury v. Molins*, 6 Ves. 328.

stood by and seen the improvements going forward, giving at least an implied assent to them, he will be enjoined from injuring the beauty of the grounds by cutting down the trees;¹ for where a man encourages another to lay out money, upon the supposition that he never means to exercise his legal rights, equity will not permit him to exercise them.²

§ 693. Injunction in Special Cases. — An injunction will also be allowed, to restrain a lessee from pulling down, damaging, or destroying, contrary to his covenant, any of the buildings, trees, bark, wood, underwood, hedges, or fences, or from sowing the farm with any pernicious crop, or removing from the farm any of the hay or straw, dung or manure, produced or made thereon;³ or to prevent a lessee from making such alterations in a dwelling-house, by changing it into a store or warehouse, as would produce a permanent injury to the building.⁴ But the rule is not so rigid when applied to city leases as in some other cases; for where a tenant for a term of eight years, in the city of New York, pulled down a fence, and proceeded to build a stable on the rear of the lot, the court refused to restrain him from such proceeding, on the ground that if it amounted to waste the party had a perfect remedy at law for the injury, and that a court of equity interfered to prevent future waste only in cases where there are some special grounds for equitable interference,—as, where waste has already been committed, or a discovery is necessary, or the complainant has no remedy at law. In ordinary cases, the account for waste already committed is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits.⁵

§ 694. Equitable Relief not restricted to the Reversioner. — We have observed that the immediate reversioner could alone

¹ *Jackson v. Cator*, 5 Ves. 691. ² *Brydges v. Kilburne*, 5 Ves. 689.

³ *Pratt v. Brett*, 2 Madd. 62; *Kimpton v. Eve*, 2 Ves. & B. 349.

⁴ *Douglas v. Wiggins*, 1 Johns. Ch. 435.

⁵ *Winship v. Pitts*, 3 Paige, 259.

maintain an action at law for waste,— the ground of interposition, in general, being that of a privity of estate between the parties ; but equity does not follow the law in this respect, for a remainder-man in fee may have an injunction to stay waste against an under-lessee, notwithstanding the intermediate estate.¹ And it will be granted in favor of the mesne remainder-man for life ; for though he has no right to the timber, yet, if the first tenant for life should die, he would have an interest in the mast and shade.² A termor who has built upon land which he holds at a ground-rent is, upon a proper case shown, as much entitled to an injunction to stay waste against his under-tenant, as if he had an estate of inheritance.³ So a mortgagee in possession who commits waste by cutting timber, without applying the money arising from the sale of such timber in reducing the mortgage debt, will be restrained in equity, upon a bill filed by the mortgagor. A mortgagor in possession will also be restrained from committing waste ; for the whole estate is the security, and ought not to be diminished.⁴ But he may cut underwood at seasonable and proper times ; Lord Eldon remarking that there never was an instance of preventing the mortgagor from taking the ordinary fruit of the land.⁵ Trustees to preserve contingent remainders are entitled to all remedies of law and equity, to support their trust, and may therefore file a bill for an injunction against a tenant for life committing waste.⁶ In the case also of joint tenants and tenants in common, with respect to whose acts of waste, as between themselves, the common law has provided no remedy, courts of equity will interfere when it appears that waste has been committed or threatened by one

¹ *Farrant v. Lovell*, 3 Atk. 723; *Roswell's Case*, 1 Roll. Abr. 377; *Tracy v. Tracy*, 1 Vern. 23; *Robinson v. Litton*, 3 Atk. 210.

² *Mollineux v. Powell*, 3 P. Wms. 268, n.; *Perrott v. Perrott*, 3 Atk. 94; *Davies v. Leo*, 6 Ves. 784.

³ *Mayo v. Feaster*, 2 McCord, Ch. 137.

⁴ *Brady v. Waldron*, 2 Johns. Ch. 148; *Farrant v. Lovell*, *supra*.

⁵ *Hampton v. Hodges*, 8 Ves. 105; *Brumley v. Fanning*, 1 Johns. Ch. 501.

⁶ *Garth v. Cotton*, 1 Dickens, 183; *Stansfield v. Habergham*, 10 Ves. 273. Such a suit may also be instituted by a tenant for life in remainder against a prior tenant for life. *Birch v. Birch*, L. R. 9 Eq. 683; 18 W. R. 594.

tenant in common, who has become possessed of the whole premises.¹

§ 695. Granted only for Substantial Injury to the Freehold.—Relief will not be granted on slight or uncertain grounds; it is not sufficient for a plaintiff to swear merely that he has been informed and believes that the defendant intends to commit waste; or upon a simple apprehension that he means to do mischief, when he denies any such intention; but there must appear to be an actual attempt to commit waste, or some act from which the intention is fully evinced, as sending a surveyor to mark out the trees, or the like.² Threats, however, will form a sufficient ground for an injunction; for it is not necessary to wait until waste has actually been done.³ And it has been granted against a tenant for life, who insisted upon a right to commit waste, where he had none, although no waste was in fact committed.⁴ To entitle a party to relief by injunction on the specific ground of waste, it must appear that the property in dispute is actually affixed to the freehold, and is not a mere movable fixture. For where a bill was filed praying an injunction and account, stating that the defendant had committed waste by destroying a dove-cot, and by removing the locks from the doors of the house, the chains from the lawn, the statues, images, and fences from the pleasure-ground, wardrobes, presses, and closets, forming part of the wainscot of the house, the Lord Chancellor, in giving his judgment, said: “The foundation of this motion for an injunction is, first, a clear act of waste; and, second, an act removing things supposed to be fixed to the freehold, wainscot, presses, &c. As to the dove-cot, a clear act of waste is proved; therefore, against such waste, the injunction must be revived. But

¹ *Hawley v. Clowes*, 2 Johns. Ch. 122; *Twort v. Twort*, 16 Ves. 132; *Hole v. Thomas*, 7 id. 589.

² *Jackson v. Cator*, 5 Ves. 688; *Hanson v. Gardiner*, 7 id. 309.

³ *Gibson v. Smith*, 2 Atk. 182; *Oxford v. Richardson*, 6 Ves. 706; *Barry v. Barry*, 1 Jac. & W. 653.

⁴ *Gibson v. Smith*, Barnardiston, 497. An injunction will not be allowed to prevent the repetition of a trespass in entering and cutting down timber on land owned by the plaintiff, and of which he is in possession; for he has a remedy at law. *Stevens v. Beekman*, 1 Johns. Ch. 318.

I cannot grant it against removing the presses, &c., which are mere personal property if not affixed to the freehold.”¹

§ 696. Generally not granted to a doubtful Title.—Neither will an injunction to stay waste be granted where the plaintiff’s title is denied; especially if there has been any unnecessary delay in trying the title at law;² nor where the parties are litigating adverse rights in a court of law, or the defendant has been a long time in possession, claiming adversely.³ The question of disputed title must in general be first disposed of by the proper jurisdiction; but in a case where the defendant to a bill to stay waste stated that he was in possession by a title of his own, yet admitted that he was let into possession by the plaintiff’s tenant, in breach of his duty to his landlord, the defendant’s title was, for this purpose, held to be no better than the tenant’s, and he was not permitted to avail himself of a possession so improperly obtained, and was on that account restrained.⁴ And where the right is doubtful, equity will sometimes also restrain a tenant until the right is determined at law.⁵ If a tenant, defending an ejectment, makes use of the interval to do all the mischief he can, by breaches of covenant and wilful waste, an injunction will be granted at common law, though it is otherwise if an ejectment has not been brought;⁶ and we have seen that the Revised Statutes of New York provide a remedy in a court of law for such a case.⁷ But if a tenant covenants not to plough pasture, and if he should, to pay at the rate of twenty shillings an acre per annum, the court will refuse an injunction, as the damage has in that case been settled between the parties themselves, and a price set for ploughing; nor on the other hand, will the court assist a defendant coming in for relief against such payment.⁸

¹ Kimpton v. Eve, 2 Ves. & B. 349.

² Higgins v. Woodward, 1 Hopk. 342.

³ Storm v. Mann, 4 Johns. Ch. 21; Jones v. Jones, 3 Mer. 173; Pillsbury v. Hopton, 6 Ves. 51.

⁴ Courthope v. Mapplesden, 10 Ves. 290; Norway v. Rowe, 19 id. 154.

⁵ Sunderland v. Newton, 3 Sim. 450.

⁶ Lathrop v. Marsh, 5 Ves. 259.

⁷ Ante, § 690.

⁸ Woodward v. Giles, 2 Vern. 119.

§ 697. Injunction against Life-tenant without Impeachment of Waste.—An estate for life is always impeachable for waste, unless the contrary has been expressly provided for.¹ And a tenant for life without impeachment of waste, who makes an unconscientious or malicious use of his power, will be restrained and controlled by a court of equity, whenever his acts tend to the destruction of the inheritance. As, where the tenant for life, “without impeachment of waste,” of Raby Castle, had stripped the castle of the doors, windows, &c., and was proceeding to pull it down, he was enjoined from any further proceeding, and required to repair it forthwith.² Upon this principle, also, equity will prevent the cutting of timber of too young a growth,³ or trees which have been planted for the protection or shelter of the several mansion-houses belonging to the estate, or for ornament, or which grow in lines, vistas, walks, or other grounds belonging to the mansion.⁴ And it is to be observed that a tenant cannot justify waste under a parol license; and the fact that the license was on condition that he should clear and seed the land on which he cut the timber, does not render such a license admissible.⁵ Although a Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet when such timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance.⁶

¹ Cole *v.* Peyson, 1 Ch. R. 57; Gower *v.* Eyre, Coop. 156; Wright *v.* Atkyns, 19 Ves. 299; *ante*, § 355.

² Barnard's Case, Prec. Ch. 454; s. c. 2 Vern. 738; Packington's Case, 3 Atk. 215; Clement *v.* Wheeler, 5 Fost. 361; Morris *v.* Morris, 15 Sim. 505; Wellesley *v.* Wellesley, 6 *id.* 497.

³ Chamberlayne *v.* Dummer, 1 Bro. C. C. 166; Strathmore *v.* Bowes, 2 *id.* 88.

⁴ Downshire *v.* Sandys, 6 Ves. 110; Tamworth *v.* Ferrers, *id.* 419; Williams *v.* McNamara, 8 *id.* 70; Day *v.* Merry, 16 *id.* 375; Leeds *v.* Amherst, 2 Phill. 117.

⁵ McGregor *v.* Brown, 10 N. Y. 114; 2 N. Y. R. S. 334.

⁶ Bubb *v.* Yelverton, Hastings, *Ex parte*, L. R. 10 Eq. 465.

CHAPTER XIV.

OF POSSESSORY REMEDIES.

SECTION I.

THE ACTION OF EJECTMENT.

§ 698. Nature of the Action.—Founded on Claimant's Right of Possession.—After the tenancy has expired by its own limitation, or has been terminated by acts of the parties, as by a forfeiture, notice to quit, or the like, the landlord's right of possession again becomes complete, and he may at once exercise it by an entry upon the premises; or if possession is withheld, he may call in the law to his assistance, and receive possession at the hands of the sheriff.¹ The ordinary common-law remedy, by which he proceeds to recover possession, is the action of ejectment; and this is in fact the only civil remedy to which he can resort in any case where a statute has not authorized a summary proceeding for the recovery of possession. It is strictly a possessory action, and the party claiming possession recovers on his general right of entry, whether his title be to an estate in fee, for life, or for years.²

¹ It was at one time held in England, and is still the law in some States, that, since the statutes of forcible entry and detainer, the landlord could not use force to regain possession or expel the tenant; but the law is now settled otherwise in England, and in some, if not most, of the United States. See *ante*, §§ 531, 532.

² *Jackson v. Brownson*, 7 Johns. 227; *Penn v. Divellin*, 2 Yeates, 309; *Tidd*, Pr. 1190. Since the plaintiff in ejectment must have both title and right to possession, he cannot recover possession while the lessee's rights under the lease subsist, even as against one not claiming under the lease. *Cobb v. Lavalle*, 89 Ill. 331.

At common law, in order to support the fiction of a lease, entry, and ouster, upon which the action was founded, an actual entry upon the land by the claimant was necessary before bringing the action, and while on the land he executed a lease to some person who suffered himself to be turned off by a convenient friend, provided for the purpose; for according to the old law of maintenance, it was a penal offence to convey a title to another, when the grantor himself was not in possession. The modern action is not confined to the trial of disputed titles, yet the necessity of a formal entry still limits the remedy to cases in which the claimant has a present right of possession, whether the conventional relation of landlord and tenant subsists or not. The principles of the action remain the same as at common law, and although its proceedings have been changed, and much of its quaint and useless machinery abolished, both in England and the United States, the right to make an entry still continues requisite, though the entry itself is unnecessary.¹

§ 699. When it lies.—According to the common-law rule, this action may be brought against any person in possession by one having a present exclusive right of possession.² It does

¹ *Hawk v. Senseman*, 6 S. & R. 21; *Clay v. White*, 1 Munf. 162; *Rugge v. Ellis*, 1 Bay. 107; *Young v. Irwin*, 2 Hayw. 11; *White v. St. Guiron's*, 1 Minor, 331; *Taylor v. Buckner*, 2 A. K. Marsh. 18; *Shearman v. Irvine's Lessee*, 4 Cranch, 367; *Hanks v. Price*, 32 Gratt. 107. In Alabama, the action of trespass to try titles has been substituted for the actions of ejectment, and trespass for mesne profits, and performs the office of both. *Bullock v. Wilson*, 3 Port. 382.

² *Colston v. McVay*, 1 A. K. Marsh. 251; *Jackson v. Selover*, 10 Johns. 368; *Rowan v. Kelsey*, 18 Barb. 484; *Bryan v. Butts*, 27 *id.* 503; *The King v. Mellor*, 2 East, 190; *Goodtitle v. Wilson*, 11 *id.* 345. By the Revised Statutes of New York, no person can recover in ejectment unless he has at the time of commencing the action a valid subsisting interest in the premises claimed, and a right to recover the same; or to recover the possession thereof, or of some share, interest, or portion thereof, to be proved and established at the trial. If the premises for which the action is brought are actually occupied by any person, the occupant must be named defendant in the declaration; if they are not so occupied, the action must be brought against some person exercising acts of ownership on the premises claimed, or having some interest therein at the commencement of

not lie for property which in legal contemplation is not tangible, as for a mere rent, common in gross, watercourse, or other incorporeal hereditament which passes only by grant.¹ But in general it lies for any thing demisable, as for a common appendant or appurtenant, watercourse, fishery, or the like, if demanded with the land in respect of which it is claimed; for the sheriff, in giving possession of the land, gives possession of the hereditament.² The reservation to the grantor, "of the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the said premises without any hindrance or molestation from the grantee," is such an interest in the land as may be recovered in ejectment.³ But the grant of a privilege to erect a machine and building upon land, without defining the place where they are to be erected, or the quantity of ground which is to be occupied, does not without an actual entry and location, confer a right to this action.⁴

§ 700. Landlord's right to re-enter. — Demand. — At common law, also, when a lease for years was granted to a tenant, and the right of possession thereby transferred to him, the landlord could not legally enter upon the land during the continuance of the term; and was consequently without remedy to recover back his possession while the term lasted, although the tenant should neglect to pay rent, or otherwise disregard the conditions of his grant.⁵ This, upon a lease of any consequence, became a serious evil to landlords, for the tenant might be so indigent as to render an action of covenant upon the original lease altogether useless, and the premises might be

the suit. It can only be maintained for real property corporeal, upon which an entry may be made for something tangible, and of which the sheriff can deliver actual possession. *Child v. Chappell*, 9 N. Y. 246; *McCreery v. Everding*, 54 Cal. 168; *Altschul v. Polack*, 55 *id.* 633.

¹ *Jackson v. Buel*, 9 Johns. 298; *Jackson v. May*, 16 *id.* 184; *Black v. Hepburne*, 2 *Yeates*, 331; *Doe v. Craig*, 3 *Green*, 191; 3 *Bl. Com.* 206; *Challenor v. Thomas*, *Yelv.* 143; *Adams's Eject.* 21.

² *Baker v. Roe*, Ca. temp. *Hardw.* 127; *Newman v. Holdmyfast*, *Stra. 54*; *Bull. N. P.* 99.

³ *Jackson v. Buel*, *supra*.

⁴ *Jackson v. May*, *supra*.

⁵ *Jackson v. Hogeboom*, 11 *Johns.* 163.

left without a sufficient distress to satisfy the rent. In order to obviate this difficulty, the practice was adopted of inserting in the lease a proviso, declaring the lease forfeited if the rent remained unpaid for a certain time after it became due, or if any other covenant was broken by the lessee, and empowering the landlord in such cases to re-enter and reoccupy his lands; and without such a clause in the lease, as we have observed in treating of the subject of a breach of condition, he would not be entitled to re-enter. We have already had occasion to notice the embarrassing particularity which was necessary to be observed in making a demand of rent, in order to take advantage of a forfeiture for its non-payment. The provisions of the statute 4 Geo. II. c. 28, dispensing with the technicalities of the common-law demand, where six months' rent is in arrear, and there is no sufficient distress upon the premises, have been generally adopted in the United States, except in Pennsylvania, where the common law prevailed until very recently;¹ and in New York where the sufficiency of distress clause has been abrogated, by abolishing the right to distrain.

§ 701. In New York, Landlord entitled to Judgment, when.—
If upon the trial of such a cause in New York it shall be proved, or if upon judgment by default against the defendant it shall appear to the court by affidavit, that the landlord had a right to commence the action, according to the provisions of this section of the statute, the plaintiff in the action will have judgment to recover the possession of the demised premises and his costs, and the court will award execution therefor.²

¹ McCormick *v.* Connell, 6 S. & R. 151. In Vermont, ejectment lies for non-payment of rent without any previous demand, the tenant having a right to remain by paying the rent and costs at any time before judgment. Maidstone *v.* Stevens, 7 Vt. 487. *Ante*, §§ 301, 493, and note.

² 2 R. S. 505. The affidavit entitling the plaintiff to judgment on the default here referred to may be filed in the clerk's office, and no motion in court is necessary for the purpose. Livingston *v.* Conner, 7 Wend. 521. And though by the statute the service of the declaration is substituted for the formal demand of rent, which, at common law, must have been made upon the day when the forfeiture accrued, in case of non-payment, still, it is not necessary that the day of the demise in the declaration should be the very day of the service; it is enough if the day of

A recent statute of the same State has also provided an additional mode of re-entry, in cases where there may be sufficient goods on the premises to satisfy the rent, by substituting a fifteen days' notice of the landlord's intention to re-enter, instead of showing that there was no sufficient distress on the premises. This enactment seems to follow as a necessary consequence of abolishing distress for rent; but we have already discussed this subject under the head of conditions, and need not, therefore, enlarge upon it in this place.¹

§ 702. Demand and Notice to Quit.—When necessary.—Where the tenancy has terminated by lapse of time, or by the death of the person upon whose life the estate was limited, a right of entry at once vests in the lessor, and no previous demand is necessary as a preliminary to an action of ejectment.² But in case of a tenancy at will, or from year to year, notice to quit must be first served upon the tenant in possession; for it is only after the relation of landlord and tenant has ceased to exist that the withholding of the premises becomes unlawful, and the landlord's right of possession commences. We have seen when, and under what circumstances, a notice to quit is necessary; and it may be further observed that there are cases where although no technical notice to quit is required, yet a reasonable demand of possession is necessary to complete the landlord's right of action. Thus, where a party is let into possession, pending a negotiation for a sale or lease, a demand of possession, or something equivalent

the demise be after the rent became due; for the title of the lessor must be taken to have accrued on the day when the forfeiture would have accrued at common law by the non-payment of rent. *Doe v. Shawcross*, 3 B. & C. 752.

¹ *Ante*, § 302.

² At the expiration of a lease of land, a building erected thereon by the lessee was wrongfully continued upon the lot, by those claiming under him. Ejectment being brought for the lot alone, by metes and bounds against parties occupying separately the different stories of the building, it was held that the action would lie against all the defendants, as being joint trespassers on the land, in using it to uphold the building, and that the plaintiff was not bound to elect against which one she would proceed. *Pearce v. Ferris*, 10 N. Y. 280.

thereto, is necessary; because, being let into possession, he becomes a tenant at will until such tenancy is determined.¹ And if a tenant holds over after the termination of his lease, being in treaty for a new one;² or a party is let into possession under a void or imperfect lease;³ in either case, the entry being lawful, the possession remains so until his right of possession is determined by a demand of possession.⁴ Anything, however, that amounts to notice that the possession will be considered unlawful, appears to be equivalent to a demand of possession; and therefore a threat to take measures to recover possession was held a sufficient demand.⁵ But a disclaimer of the plaintiff's title, by the party in possession, renders a demand unnecessary;⁶ and a demand made of the wife of the party on the premises is sufficient.⁷

§ 703. By a Mortgagee.—Form of.—We have seen that at common law, a mortgagee may eject a mortgagor who is in possession of mortgaged premises, on non-payment of the mortgage-money upon the day stipulated, without giving

¹ Right *v.* Beard, 13 East, 210; Doe *v.* Stanion, 1 M. & W. 700. So where a licensee had been suffered to stay and make improvements. Chicago, B. & Q. R. R. *v.* Knox College, 34 Ill. 195, 202.

² Doe *v.* Stennett, 2 Esp. 717; Emmons *v.* Scudder, 115 Mass. 367.

³ Doe *v.* Edgar, 2 Bing. N. C. 503.

⁴ Denn *v.* Rawlins, 10 East, 261; Doe *v.* Jackson, 1 B. & C. 448.

⁵ Doe *v.* Price, 9 Bing. 356; Ball *v.* Cullimore, 2 Cr. M. & R. 120.

⁶ Doe *v.* Thompson, 1 Nev. & P. 215. And see *ante*, §§ 472, 522.

⁷ Roe *v.* Street, 2 Ad. & E. 329. The statute 4 Geo. II. dispenses with a demand for rent in those cases only where there is no sufficient distress upon the premises, as well as six months' rent in arrear; and it is still necessary for the lessor to comply with all the formalities of the common law, before he can proceed upon a clause of re-entry for non-payment of rent, if a sufficient distress can be found. Doe *v.* Wandlass, 7 T. R. 117; Jackson *v.* Wyckoff, 5 Wend. 53; Jackson *v.* Harrison, 17 Johns. 66. But an insertion in the proviso that the right of re-entry shall accrue upon the rent being lawfully demanded will not render a demand necessary if there be no sufficient distress; for it is only stating in express words that which is in substance contained, from the principles of the common law, in every proviso of this nature. Doe *v.* Alexander, 2 M. & S. 525; Ludwell *v.* Newman, 6 T. R. 458; Campbell *v.* Sheppen, 42 Md. 81.

notice to quit, or even making any demand of possession, and that the Revised Statutes have abolished the action of ejectment in such a case in New York. But where the premises are demised to a third person, subsequent to the mortgage, the mortgagee may maintain ejectment against him, whether the demise were for a term of years, or from year to year, without giving any notice to quit, for the lessee is not tenant to the mortgagee;¹ and in such a case the declaration should be upon the demise of the mortgagee only. Where, however, the lease was made prior to the mortgage, the mortgagee is only an assignee of the lessor, with no greater rights than any other assignee. The action may therefore be on the demise of the mortgagee alone, or on the several demises of the mortgagor and mortgagee, but not on their joint demise.² The defendant may avail himself of any defence which his lessor, the mortgagor, might set up if he had appeared; but he cannot set up the title of a third person. And where in ejectment on the several demises of a mortgagor and mortgagee, the defendant offered to prove that seven or eight years back, and after the execution of the mortgage, he brought ejectment against the mortgagor, who was then in possession; that the cause was referred to arbitration, and that the award was in favor of him, the present defendant, who thereupon entered under a writ of possession, and had occupied the premises ever since,—it was held that these proceedings were not admissible in evidence against the mortgagee, although he was present at one of the meetings before the arbitrator, but took no part in the proceedings.³ And the mere fact of the mortgagee having received interest on his mortgage, down to a time subsequent to the date of the demise in the declaration, is no recognition of the right of the mortgagor to the possession up to the time such interest was paid, so as to be a defence for a defendant who was tenant to the mortgagor.⁴

¹ *Evans v. Elliot*, 9 Ad. & E. 342; *Keech v. Hall*, 1 Doug. 21; *Thunder v. Belcher*, 3 East, 449. See *ante*, §§ 120, 121, and notes. *Doe v. Wharton*, 8 T. R. 2.

² *Doe v. Adams*, 2 Cr. & J. 232.

³ *Doe v. Webber*, 1 Ad. & E. 119.

⁴ *Doe v. Cadwallader*, 2 B. & Ad. 473.

§ 704. Complaint in.—Premises how to be described.—With respect to the requisites of the complaint in an action of ejectment, we may observe that it is necessary to describe with particularity the nature of the property demanded. Thus when a common is to be recovered, it must be described as appendant or appurtenant to certain land; if a watercourse, as land covered with water and the like.¹ But although a plaintiff must truly describe the premises claimed, he is not bound to set forth the nature of the estate, nor the quantity of the interest claimed by him, and he has been allowed to recover an undivided share, although in his declaration he claimed the whole of the premises;² or where he gave evidence of a tract of land, called in the patent Feltigraw's Fortune, which was also known by the name of Felty's Fortune, and so called in the declaration.³ If he describes the land in his declaration by courses and distances, without naming any monument except the point begun at, and without reference to any survey, or to the lines of the lot, he can only recover according to the direction of the magnetic needle, at the time when the action was brought.⁴ And, as a general principle, the lines of a tract of land originally run by course and distance, without calls, must be confined to the courses and distances, and cannot be extended beyond them.⁵ The ancient rule required the description of the premises to be so certain that the sheriff might know exactly of what to deliver possession; and such is still the rule in some of the States.⁶ But that rule was subsequently abolished in England; and it became the practice for the sheriff to deliver possession of the premises recovered, according to the directions of the claimant, who therein acts at his own peril.⁷ This relaxation of

¹ Co. Lit., 4, a; *Challenor v. Thomas*, *supra*; *Doe v. Plowman*, 1 East, 441; *Vice v. Burton*, 2 Stra. 891.

² *Harrison v. Stevens*, 12 Wend. 170; *Van Alstyne v. Spraker*, 13 *id.* 578.

³ *Fouke v. Kemps*, 5 Har. & J. 135.

⁴ *Brooks v. Tyler*, 2 Vt. 348.

⁵ *Giraud v. Hughes*, 1 Gill & J. 249; *Thomas v. Godfrey*, 3 *id.* 142.

⁶ *Fenwicks v. Floyd*, 1 Har. & G. 172; *Clark v. Clark*, 7 Vt. 190; *Sawyer v. Fitts*, 4 Stew. & P. 365; *Bindover v. Sindercombe*, 2 Ld. Ray. 1470.

⁷ *Cottingham v. King*, 1 Burr. 623, 630; *Connor v. West*, 5 *id.* 2672.

the rule, however, opened the way to numerous and vexatious applications to correct errors of the sheriff in delivering possession; in consequence of which, the Supreme Court of New York laid down the rule that where a general verdict is given for the plaintiff, he is restricted to the taking possession of so much only as he gave evidence of his title to on the trial.¹

§ 705. Proof of Title not Required. — No proof of title is required in this action, when it is brought by a landlord, since if a tenant has once recognized the title of the plaintiff, and treated him as his landlord, by accepting a lease from him, or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted, and that whether the action be debt, *assumpsit*, covenant, or ejectment;² for it is a general rule that a tenant shall never be permitted to

¹ *Seward v. Jackson*, 8 Cow. 427. The Revised Statutes of New York require that the premises shall be described with convenient certainty, designating the number of the lot or township, if any, in which they are situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and, if none, describing such premises by metes and bounds, or in some other way, so that, from such description, possession of the premises claimed may be delivered. And if the plaintiff claims any undivided share or interest in any premises, he shall state the same particularly in the declaration. 2 R. S. 304, §§ 8, 9.

² *Townsend v. Davis*, Forrest, 120; *Roe v. Prideaux*, 10 East, 158; *Doe v. Wilkinson*, 3 B. & C. 413; *Barwick v. Thompson*, 7 T. R. 488; *Doe v. Pegge*, 1 *id.* 758; *Tompkins v. Snow*, 63 Barb. 525; *De Rutzen v. Lewis*, 5 Ad. & E. 277; *Tyler v. Davis*, 61 Tex. 674; *Campbell v. Hampton*, 11 Lea, 440; *Morgan v. Morgan*, 65 Ga. 493. So in summary process or forcible entry and detainer: *Oakes v. Munroe*, 8 Cush. 282; *Hogan v. Hurley*, 8 Allen, 525; *Emerick v. Tavener*, 9 Gratt. 221; *Hawes v. Shaw*, 100 Mass. 287; *Silver v. Sumner*, 61 Mo. 253; *Norwood v. Kirby*, 70 Ala. 397; writ of entry: *Towne v. Butterfield*, 97 Mass. 105; or distress: *Hatchett v. Hykes*, 3 Brewst. 162; *ante*, § 629. The general rule is applied as between a sub-lessee purchasing the lease and the lessee: *Scott v. Levy*, 6 Lea, 662; although the lessee had covenanted not to underlet: *Fordyce v. Young*, 39 Ark. 135; and as between the lessor's assignee and the lessee: *People v. Angel*, 61 How. Pr. 157; and as between the tenant and the purchaser of the premises at a sale on execution against the landlord, although the latter has not the legal title: *Donald v. McKinnon*, 17 Fla. 746.

controvert his landlord's title,¹ or set up against him a title acquired by himself during his tenancy, which is hostile in its character to that which he acknowledged in accepting the demise.² And this rule extends to a tenant holding over, as well as to an under-tenant, assignee, or other person claiming under the lessee;³ and is applicable to every species of ten-

¹ We have before stated the origin of this rule; *ante*, § 89. It is held that the tenant is not estopped to deny any further and greater right in the landlord than that of possession. *Jochen v. Tibbells*, 50 Mich. 33; and see *Hulseman v. Griffiths*, 10 Phila. 350, where it is held, since the estoppel applies only to cases where the right of possession of the premises is brought in question, that it does not apply in an action for ground rent.

² *Jackson v. Harper*, 5 Wend. 246; *Sharpe v. Kelley*, 5 Den. 431; *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Baytup*, 3 Ad. & E. 188; *Willison v. Watkins*, 3 Pet. 43; *Millhollin v. Jones*, 7 Ind. 745; *Arnold v. Woodward*, 4 Col. 249; *Morrison v. Bassett*, 26 Minn. 235; *Brewer v. Keeler*, 42 Ark. 289; *Woodruff v. Erie R. R.*, 93 N. Y. 609, where the rule was applied against the lessee in a case where the lessor, a railway corporation, had leased, without right, its road and franchises to an individual. The tenant cannot dispute the landlord's title by buying in an outstanding title: *Ryerson v. Eldred*, 18 Mich. 12; *Ronaldson v. Tabor*, 43 Ga. 230; *Newton v. Roe*, 33 *id.* 163; *Towne v. Butterfield*, *supra*; or by any act of his own: *Byrne v. Besson*, 1 Doug. Mich. 179; *Millhouse v. Patrick*, 6 Rich. 360. But the rule is otherwise if he acquires the landlord's own title. *Post*, § 708. So if the conveyance to him was by trustees for the landlord, authorized to convey before the relation of landlord and tenant arose. *Carson v. Crigler*, 9 Bradw. (Ill.) 83. The principle has no application when the party in possession did not enter under the other and has never made himself the other's tenant in fact. *Nims v. Sherman*, 43 Mich. 45.

³ *Jackson v. Stiles*, 1 Cow. 575; *Graham v. Moore*, 4 S. & R. 467; *Jackson v. Harder*, 4 Johns. 202; *Lewis v. Willis*, 1 Wils. 314; *Barwick v. Thompson*, 7 T. R. 488; *Taylor v. Needham*, 2 Taunt. 278; *Wood v. Day*, 1 Moore, 389; *Allason v. Stark*, 1 Per. & D. 183; *Ingraham v. Baldwin*, 9 N. Y. 45; *Jones v. Dove*, 7 Oregon, 467. Thus a tenant holding over: *Binney v. Chapman*, 5 Pick. 124; *Codman v. Jenkins*, 14 Mass. 93; *Shelton v. Doe*, 6 Ala. 230; *Falkner v. Beers*, 2 Doug. (Mich.) 117; *Vernam v. Smith*, 15 N. Y. 327; *Fleming v. Gooding*, 10 Bing. 549; *Longfellow v. Longfellow*, 61 Me. 590; *Binney v. Foss*, 62 *id.* 248; or an under-tenant: *Lond. & N. W. R. R. v. West*, L. R. 2 C. P. 553; or the assignee of lessee: *Stagg v. Eur. Co.*, 56 Mo. 317; *Earle v. Hale*, 31 Ark. 470; or the heirs of the tenant: *Lewis v. Adams*, 61 Ga. 559. So the owner in fee if he takes a lease: *Eister v. Paul*, 54 Pa. St. 196; *Campbell v. Sheppeny*, 42 Md. 81; and is in possession when he takes it: *Richards v.*

ancy, whether for years, or from year to year, at will, or by sufferance.¹ As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy,² if he takes a lease from a third person, it is void, and cannot work an adverse possession against his landlord; for the possession of a tenant is the possession of his landlord.³ Nor can he render his possession adverse,

Harvey, 37 Ga. 224; Patterson *v.* Hansel, 4 Bush, 654; Thayer *v.* Soc. of Unit. Bro., 20 Pa. St. 60; Abbott *v.* Cromartie, 72 N. C. 294; Prevost *v.* Lawrence, 51 N. Y. 219; Lucas *v.* Brooks, 18 Wall. 431; or lessee's vendee in fee: Phillips *v.* Rothwell, 4 Bibb, 33; Harker *v.* Gustin, 7 Halst. 42; Turley *v.* Rodgers, 1 A. K. Marsh. 245; Rose *v.* Davis, 11 Cal. 135; Russell *v.* Irwin, 38 Ala. 50; though it is otherwise if he bought in ignorance of the lease: Thompson *v.* Clark, 7 Pa. St. 62; Cooper *v.* Smith, 8 Watts, 536; Jackson *v.* Davis, 5 Cow. 129. So the lessee is estopped to show that the lease is imperfectly executed: Ripley *v.* Cross, 111 Mass. 41; or is void: Heath *v.* Williams, 25 Me. 209; King *v.* Murray, 6 Ired. 62; or that the lessor's title is fraudulent: Ritchie *v.* Glover, 56 N. H. 510; Alchorne *v.* Gomme, 2 Bing. 54; or impeachable by others: Carter *v.* Lee, 51 Ind. 292; if the fraud is not on the lessee himself: Smith *v.* McCurdy, 3 Phila. 488. The tenant is estopped to show the lessor was merely an agent or committee. Holt *v.* Martin, 51 Pa. St. 499; Stott *v.* Rutherford, 92 U. S. 107.

¹ Love *v.* Dennis, 1 Harp. 70; Williams *v.* Mayor, 6 Har. & J. 533; Trustees *v.* Williams, 9 Wend. 147; Jackson *v.* Miller, 6 Cow. 751; Co-burn *v.* Palmer, 8 Cush. 124; Brandter *v.* Marshall, 1 Caines, 394.

² Galloway *v.* Ogle, 2 Binn. 472; Graham *v.* Moore, *supra*; Jackson *v.* Whitford, 2 Caines, 215; Eister *v.* Paul, *supra*; O'Halloran *v.* Fitzgerald, 71 Ill. 53; Bertram *v.* Cook, 32 Mich. 518.

³ Jackson *v.* Miller, 6 Cow. 751; Lecatt *v.* Stewart, 2 Stew. 474; Johnson *v.* Hinman, 10 Johns. 292; Rogers *v.* Boynton, 57 Ala. 501. The foundation of this estoppel being the delivery of possession to the tenant, it continues as long as that possession subsists. *Ante*, § 89; *supra*, n. 4. If, therefore, the possession is surrendered, the estoppel ceases: Campbell *v.* Campbell, 21 Mich. 438; Nims *v.* Sherman, 43 *id.* 45. Williams *v.* Garrison, 29 Ga. 503; Hodges *v.* Shields, 18 B. Monr. 828. The possession of the tenant is to be deemed the possession of the landlord, until twenty years after the termination of the tenancy; or, if there was no written lease, after the last payment of rent; notwithstanding the tenant may have acquired another title, or claimed to hold adversely. 2 N. Y. R. S. 294, § 13; Code of Pro. § 86; and see Failing *v.* Schenck, 3 Hill, 344; Jackson *v.* Harper, 5 Wend. 246; Byrne *v.* Beason, 1 Doug. (Mich.) 179; Allen *v.* Chatfield, 8 Minn. 435; Blanchard *v.* Tyler, 12 Mich. 339.

except by an open and notorious act;¹ for if he takes a secret conveyance in fee of the land from one claiming to be owner, and keeps it secret, the character of his possession is not changed. So an adverse claimant, who gets into possession of land by tampering with the tenant, cannot resist the landlord's claim where the tenant himself could not.² But the rule that a tenant is precluded from denying the title of his landlord is not to be extended so as to estop him from denying the validity of rights which had no existence when he took possession; and he will be estopped from denying only what he has once admitted.³

§ 706. Tenant's Estoppel to deny Title. — Where the lease is by deed, a tenant is technically estopped from disputing his landlord's title, who is only required to produce the counterpart of the lease on the trial.⁴ And where the lease is by

¹ *Stacy v. Bostwick*, 48 Vt. 192. See *Campbell v. Fetterman*, 20 W. Va. 398. And mere holding over is no evidence of adverse possession, and the tenant's title is still presumed to be in subordination to the landlord's. *Gwynne v. Jones*, 2 Gill & J. 173.

² *Stewart v. Roderick*, 4 Watts & S. 188; *Galloway v. Ogle*, 2 Binn. 468; *Caufman v. Cong. Cedar Spring*, 6 id. 59-62; *Sharpe v. Kelley, supra*; *Reed v. Shepley*, 6 Vt. 602; *Jackson v. Stewart*, 6 Johns. 34; *Syme v. Saunders*, 4 Strobb. 196; *Jackson v. Harper*, 5 Wend. 246; *Chambers v. Pleak*, 6 Dana, 426; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Tondro v. Cushman*, 5 Wisc. 279; *Plumer v. Plumer*, 10 Fost. 558; *Jackson v. Wheedon*, 1 E. D. Smith, 141; *Hardisty v. Glenn*, 32 Ill. 62; *Caldwell v. Center*, 30 Cal. 539.

³ *Ryerss v. Farwell*, 9 Barb. 615; *Despard v. Walbridge*, 15 N. Y. 374. Thus the holder of the equitable title is not concluded from claiming under this in a court of equity as against the legal title. *Supervisors v. Harrington*, 50 Ill. 232; *Turner v. Lowe*, 66 N. C. 413; and see *Davis v. Davis*, 83 id. 71; *McAdoo v. Callum*, 86 id. 419; *Hahn v. Guilford*, 87 id. 172. But in *Wilcher v. Robinson*, 78 Va. 602, it is held that an outstanding title, in order to defeat the action, must be a present, subsisting, and operative legal title, on which the owner could recover if asserting it by action. The tenant may show that the landlord's alleged transfer of his interest in the property is invalid, and this although the tenant has paid rent to the claimant or agreed to become his tenant supposing the claimant to have title. *De Wolf v. Martin*, 12 R. I. 33.

⁴ *Wood v. Day, supra*; *Wilkins v. Wingate*, 6 T. R. 62; *Roe v. Davis*, 7 East, 363. The tenant's possession is presumed to be under the lease, and the fact that the landlord has failed to demand the rent will not raise

parol, it will not be necessary for him to give any evidence of his title anterior to the lease; for a holding under a plaintiff, and the expiration of the tenancy, are the only things to be proved in ordinary cases.¹ Even an acknowledgment by the defendant that he went into possession under the plaintiff is sufficient to entitle him to recover,—it being a simple matter of fact for the jury to determine, whether the defendant held under the plaintiff or not.² But evidence of an agreement for a lease between the lessor in ejectment and the tenant will not enable the plaintiff to recover possession, when there is no proof that any lease was ever executed, or rent paid, and the tenant claims to hold adversely.³ And when a lease exists, the non-payment and non-demand of rent for twenty years will not raise a presumption that the landlord's title is extinguished, by a conveyance to the tenant or otherwise; for the possession of the one not being consistent with the title of the other, a conveyance from such other will never be presumed for the purpose of quieting the possession.⁴

a presumption that he has released his right to it. *Myers v. Silljacks*, 58 Md. 319. We have seen that the tenant's estoppel as now known grew from the delivery of possession and not from the instrument of demise. On the other hand, the only tenant's estoppel anciently known was founded on the deed solely; and did not arise unless this was an indenture; nor continue after the term expired. *Co. Lit.* 476; *Bro. Abr. Estoppel*, pl. 8; *Anon.*, *Moore*, 20 pl. 69. From a misapprehension of this distinction it has been sometimes held in modern decisions that the ordinary tenant's estoppel does not continue where the term had ended. *Page v. Kinsman*, 43 N. H. 328; *Davis v. Tyler*, 18 Johns. 490. But the clear weight of modern authority is to the contrary; and it is only where the tenant has taken a lease of his own land by his own mistake or by the lessor's fraud that he will be relieved from the estoppel by the expiration of the term. See § 707, and cases cited. But the estoppel only continues during the lease and holding over, and is not equivalent to an admission of the landlord's title. *Bertram v. Cook*, 44 Mich. 396. Per Cooley, J.

¹ *Jackson v. McLeod*, 12 Johns. 182; *Cressler v. Cressler*, 80 Ind. 366.

² *Jackson v. Dobbins*, 3 Johns. 223, 499; *Same v. Stewart*, 6 Johns. 34; *Same v. De Walts*, 7 *id.* 157.

³ *Jackson v. Cooly*, 2 Johns. Cas. 223. In an action of ejectment against a lessee, in which the lessor on his own application is made a party; the plaintiff cannot question the validity of the lease, the relation of landlord and tenant being recognized by the parties thereto. *Carleton v. Darcy*, 90 N. Y. 566.

⁴ *Whiting v. Edmunds*, 94 N. Y. 309. And in New York this rule

Neither will the tenant be allowed to show that the landlord has acknowledged by parol that the title was in another.¹

§ 707. When Estoppel does not arise.— If the relation of landlord and tenant has never been created, the estoppel of course will not arise. Thus, where the tenant has been made to take a lease by threats of violent expulsion from the land; for the general rule is founded on the presumption of the lease having been taken without force, fraud, or illegal behavior on the part of the lessor.² The estoppel of the lessee does not therefore extend to other land of the lessor not included in the demise.³ But the tenant will only be relieved on the ground of fraud if it was practised upon him, not upon a third party,⁴ and he was actually deceived thereby.⁵ Upon a similar ground also a distinction is made between cases where the party has received possession from the lessor, and where he has merely admitted his title by paying rent, attorning, or even by taking a lease. In the former case he is estopped from denying the lessor's title in any event;⁶ but in the latter, the defendant may rebut the presumption arising from such payment, by showing that he paid rent under a

holds good until the expiration of twenty years after the determination of the leasehold estate. *Id.*; Code Civ. Proc. § 373.

¹ *Jackson v. Davis*, 5 Cow. 123. In an action by the lessee against the assignee of a lease, the plaintiff having proved the delivery of the original lease to the defendant, and the execution of the counterpart, the defendant put in the original lease, which was produced by a party to whom the defendant had assigned it, by deed reciting the lease; it was held unnecessary for the plaintiff to call the subscribing witness to prove the execution of the lease, because the party is never allowed to dispute the execution of a deed, after having taken under such deed all the interest it was calculated to give. *Burnett v. Lynch*, 5 B. & C. 589.

² *Hamilton v. Marsden*, 6 Binn. 45; *Miller v. McBrier*, 14 S. & R. 382; *Thayer v. Soc. of Unit. Bro.*, 20 Pa. St. 60; *Johnson v. Chely*, 43 Cal. 300.

³ *Wyoming Coal Co. v. Price*, 81 Pa. St. 156; *Wilborn v. Whitfield*, 44 Ga. 51.

⁴ *Smith v. McCurdy*, 3 Phila. 488; *Ritchie v. Glover*, 56 N. H. 510.

⁵ *Camarillo v. Folsom*, 49 Cal. 202.

⁶ *Rennie v. Robinson*, 1 Bing. 147; *Fleming v. Gooding*, 10 *id.* 549; *Cooper v. Blandey*, 1 Bing. N. C. 45; *Doe v. Barton*, 11 Ad. & E. 307.

mistake, or through misrepresentation.¹ Even an express agreement with one who claims to be landlord does not preclude the tenant from afterwards showing that the party claiming had no title; and that the payment, or other acknowledgment, was induced by misrepresentation, or under mistake, the tenant not having been originally let into possession by the claimant.²

¹ *Fenner v. Duplock*, 2 Bing. 10; *Rogers v. Pitcher*, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1 Bing. 38; which were cases of mistake. Such also were *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. McKenzie*, 4 Mann. & G. 143; *Isaac v. Clarke*, 2 Gill, 1; *Anderson v. Smith*, 63 Ill. 126; *Cain v. Simon*, 36 Ala. 168; *Bergman v. Roberts*, 61 Pa. St. 497; *Shelton v. Carroll*, 16 Ala. 148; *Knight v. Cox*, 18 C. B. 645; *Cornish v. Searell*, 8 B. & C. 471; *Ingraham v. Baldwin*, 9 N. Y. 45. And where the tenant in possession is induced to attorn or pay rent to a person about to take the title, on the faith of an arrangement by the latter, which subsequently falls through, he is no longer estopped. *Brook v. Biggs*, 2 Bing. N. C. 572; *Hopcraft v. Keys*, 9 Bing. 618; *Acc. D. Ins. Co. v. Mackenzie*, 10 C. B. N. S. 870. In *Doe v. Brown*, 7 Ad. & E. 447; *Brown v. Dysinger*, 2 Rawle, 408; *Glenn v. Rice*, 6 Watts, 44; *Alderson v. Miller*, 15 Gratt. 279; *Locke v. Frasher*, 79 Va. 409; *Givens v. Mullinax*, 4 Rich. 590; *Jenckes v. Cook*, 9 R. I. 520; *Higgins v. Turner*, 61 Mo. 249; *Evans v. Bidwell*, 76 Pa. St. 497; fraud relieved the tenant from the estoppel. But the fraud must be shown, and not merely averred. *Peralta v. Ginochio*, 47 Cal. 459; and see *Johnson v. Chely*, 43 *id.* 300; *Carter v. Marshall*, 72 Ill. 607; *Petterson v. Sweet*, 13 Bradw. (Ill.) 255. Where the tenant seeks relief from the estoppel on the ground of fraud or mistake, a court of equity will investigate the circumstances and grant or refuse relief as justice may require. *Wiggin v. Wiggin*, 58 N. H. 235.

² *Claridge v. McKenzie*, *supra*; *Burne v. Richardson*, 4 Taunt. 720; *Doe v. Barton*, *supra*; *Doe v. Brown*, *supra*; *Schultz v. Elliott*, 11 Humph. 183. In some recent cases the tenant has been allowed to deny the landlord's title, where he was not let into possession by him, without any proof of mistake. *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 *id.* 558. But this court has since limited the application of this doctrine to cases where title necessarily came in issue. *Mason v. Wolff*, 40 Cal. 246. The doctrine of estoppel has no application as against a tenant who leased originally from the owner of the equity of redemption, but who, before the expiration of the term took a lease from the equitable assignee of the mortgage, entitled to possession, the tenant being in possession under the latter lease, and an action being brought for possession by the owner of the equity. *Chamberlain v. Perry*, 138 Mass. 546. In *Fuller v. Sweet*, 30 Mich. 237, the term of the lease had expired, and the lessee had notified the lessor that he insisted on his prior title and possession.

§ 708. Matters of Defence not barred by Estoppel. — But although the tenant cannot show that his lessor had no title to the premises when the tenancy commenced, he may show that the landlord holds in violation of the laws of the State,¹ or that his interest has since expired;² as that he has sold and conveyed the land,³ or has been evicted by title paramount, or that his title has been levied on by a judgment creditor and sold under execution;⁴ or at a tax sale,⁵ and, therefore, that he has no right to bring the suit.⁶ So he may

¹ *Satterlee v. Matthewson*, 13 S. & R. 133.

² *Den v. Ashmore*, 2 Zab. 261; *Jackson v. Davis*, 5 Cow. 123; *Presstman v. Silljacks*, 52 Md. 647. So the lessee of a tenant at will may, on the expiration of the estate at will, dispute his lessor's title and attorn to the original landlord. *Meier v. Thiemann*, 15 Mo. App. 307.

³ *Giles v. Ebsworth*, 10 Md. 333; *Clarke v. Byne*, 13 Ves. 383; *Binney v. Chapman*, 5 Pick. 124; *Dobson v. Culpepper*, 23 Gratt. 352; *Supervisors v. Herrington*, 50 Ill. 232; *Grundin v. Carter*, 99 Mass. 15; *Emmes v. Feeley*, 132 id. 346; *Otis v. McMillan*, 70 Ala. 46. So where the tenant is holding over. *McGuffie v. Carter*, 42 Mich. 497.

⁴ *Lancashire v. Mason*, 75 N. C. 455; *Duff v. Wilson*, 69 Pa. St. 316; *Smith v. Crossland*, 106 id. 413; *Wilson v. Hubbell*, 1 Penny. (Pa.) 413; *Hardin v. Forsythe*, 99 Ill. 312; *Territt v. Cowenhoven*, 79 N. Y. 400; or by foreclosure of mortgage: *Ryder v. Mansell*, 66 Me. 167; *Ramsdell v. Maxwell*, 32 Mich. 285.

⁵ *Miller v. McBrier*, 14 S. & R. 382; *Hockenbury v. Snyder*, 2 Watts & S. 240; *Newman v. Rutter*, 8 Watts, 51; *Miller v. Bonsadon*, 9 Ala. 317. So if he buy in the whole or part of the lessor's title at a tax or execution sale or by private purchase, it is a proportionate defence to suit for rent or ejectment. *Nellis v. Lathrop*, 22 Wend. 121; *Evertsen v. Sawyer*, 2 Wend. 507; *Bettison v. Budd*, 17 Ark. 546; *Waggener v. McLaughlin*, 33 id. 195; *Camley v. Stanfield*, 10 Tex. 546; *Elliott v. Smith*, 23 Pa. St. 131; *George v. Putney*, 4 Cush. 358; *Weichselbaum v. Curlett*, 20 Kan. 709; but not if it was the tenant's fault that the taxes were not paid: *Haskell v. Putnam*, 42 Me. 244; *Duffit v. Tuhan*, 28 Kan. 292.

⁶ *Hilbourn v. Fogg*, 99 Mass. 11; *St. John v. Quiltzow*, 72 Ill. 334; *Franklin v. Palmer*, 50 id. 202; *Anderson v. Smith*, 63 id. 126; *Market Co. v. Lutz*, 4 Phila. 322; *Newell v. Gibbs*, 1 W. & S. 496; *Silvey v. Thomas*, 61 Mo. 253; *Higgins v. Turner*, *id.* 249. It has sometimes been held that the tenant must have attorned to the new title. *Holt v. Martin*, 51 Pa. St. 499; *Evertsen v. Sawyer*, 2 Wend. 507; *Kingman v. Abington*, 56 Mo. 46; *Balls v. Westwood*, 2 Campb. 11. But the weight of authority is against such a requirement. See preceding cases, and also, *Simers v. Saltus*, 3 Denio, 214; *Whalin v. White*, 25 N. Y. 462, 465; *Doe v. Barton*, 11 Ad. & E. 307; *Walton v. Waterhouse*, 2 Wms. Saund. 418, n.

show that the lessor was only seised in right of his wife, for her life, and that she died before the covenant was broken;¹ or that, the lessor being executor *durante minori aetate*, the infant has since come of age.² And while the tenant cannot after a voluntary attornment to a hostile or paramount title set this up in defence when sued by the lessor, he may, if threatened with expulsion by the holder of such title, attorn thereto, without an actual expulsion from, or surrender of the premises, or take a conveyance thereof, and plead this as a constructive eviction in answer to the lessor's action.³ A

(c).; Palmer *v.* Bowker, 106 Mass. 317. The burden is, however, upon the tenant to show such a determination of the lessor's title, and he will not be allowed to assume it as a basis for filing interrogatories. Wallen *v.* Forrestt, L. R. 7 Q. B. 239. For other cases of determination of the lessor's title, see Moore *v.* Beaseley, 3 Ohio, 292; Caufman *v.* Cong. Cedar Spr., 6 Binn. 62; Dimond *v.* Enoch, Addis. 356; Marley *v.* Rodgers, 5 Yerg. 217; Jackson *v.* Rowland, 6 Wend. 666; Binney *v.* Chapman, 5 Pick. 124; Willison *v.* Watkins, 3 Pet. 43; Wells *v.* Mason, 4 Scam. 84; Franklin *v.* Carter, 1 C. B. 750; Walton *v.* Waterhouse, 2 Wms. Saund. 418, note; Lunsford *v.* Turner, 5 J. J. Marsh. 104; Swann *v.* Wilson, 1 A. K. Marsh. 99; Hayne *v.* Maltby, 3 T. R. 441; Brudnell *v.* Roberts, 2 Wils. 143; Tilghman *v.* Little, 13 Ill. 241; Randolph *v.* Carlton, 8 Ala. 606; Camp *v.* Camp, 5 Conn. 291; Hintze *v.* Thomas, 7 Md. 346; Horner *v.* Leeds, 25 N. J. 106; Hoag *v.* Hoag, 35 N. Y. 469; Ryerss *v.* Farwell, *supra*; Wild *v.* Serpell, 10 Gratt. 415; Towne *v.* Butterfield, 97 Mass. 105; Wolf *v.* Johnson, 30 Miss. 513; Pope *v.* Haskins, 16 Ala. 323; Russell *v.* Allard, 18 N. H. 222.

¹ Blake *v.* Foster, 8 T. R. 487; Lamson *v.* Clarkson, 113 Mass. 348.

² Andrews *v.* Pearce, 4 B. & P. 158. It is a good defence to an action of ejectment for a forfeiture, that the landlord, after the execution of the lease, conveyed away his title to the premises. Doe *v.* Edwards, 5 B. & Ad. 1065.

³ Stedman *v.* Gassett, 18 Vt. 346; Magill *v.* Hinsdale, 6 Conn. 464; Fitzgerald *v.* Beebe, 2 Eng. (Ark.) 310; Jones *v.* Clark, 20 Johns. 51; Foss *v.* Van Driele, 47 Mich. 201; Texas Land Co. *v.* Turman, 58 Tex. 619; and see *ante*, § 121, and notes. And the mortgagor's tenant may buy out the mortgagee. Pierce *v.* Brown, 24 Vt. 165; see also Morse *v.* Goddard, 13 Met. 177; Rawle, Cov. Title, 264; Emery *v.* Barnett, 4 C. B. N. S. 423; Mayor *v.* White, 15 M. & W. 577. In Illinois, by statute, notice must be given the lessor, or the tenant will not be protected, even by a judgment against him. Lowe *v.* Emerson, 48 Ill. 160. And the same rule exists in California at law. Calderwood *v.* Peyser, 31 Cal. 337; Wheelock *v.* Warschauer, 21 *id.* 316; Douglas *v.* Fulda, 45 *id.* 492. But while a mere threat is no eviction (Thompson *v.* Pioche, 44 *id.* 508), the

lessee is also estopped from disputing his lessor's title after it has been transferred to another, but he may show that the transfer was not valid.¹ A defendant who entered without title, and afterwards agreed to purchase of the lessor of the plaintiff, was held to have recognized him as landlord, and was not permitted to dispute his title.² But where a tenant was in possession under an adverse title, and applied to the lessor of the plaintiff to purchase, and requested to be considered as his tenant, he was permitted to show that the application was founded in mistake, or that the fee existed in himself, or out of the lessor.³

prevailing doctrine is that no such notice is required, but the tenant must show that he was actually compelled to attorn or be evicted. Cases *supra*; *Winstell v. Hehl*, 6 Bush, 58; *Hawes v. Shaw*, 100 Mass. 187; *Miller v. Lang*, 99 *id.* 13.

¹ *Phillips v. Pearce*, 5 B. & C. 433; *Carwick v. Blagrave*, 1 Brod. & B. 531; *Funk v. Kincaid*, 5 Md. 404; *Blantin v. Whitaker*, 11 Humph. 313; *Russell v. Allard*, *supra*; *Doe v. Barton*, 11 Ad. & E. 307; *Bergman v. Roberts*, 61 Pa. St. 497; *Ball v. Chadwick*, 46 Ill. 98; *Gillett v. Matthews*, 45 Mo. 307; *Pentz v. Kuester*, 41 *id.* 447; *Camarillo v. Folsom*, 49 Cal. 168. Thus the lessee of a tenant at will may defend against an assignee of such tenant by an instrument in writing, because the title was incapable of transfer. *Hilbourn v. Fogg*, 99 Mass. 11; *Palmer v. Bowker*, 106 *id.* 317.

² *Jackson v. Whitford*, 2 Caines, 215; *Jackson v. Vosburgh*, 7 Johns. 188.

³ *Jackson v. Cuerden*, 2 Johns. Cas. 353; *Jackson v. Newton*, 18 Johns. 355. A lease contained a proviso for re-entry, "in case the rent, or any part, should be behind and unpaid by the space of fourteen days next after any or either of the said days of payment, on which the same ought to be paid, and no sufficient distress being found in and upon the same premises, whereby to levy such rent;" at Ladyday the rent became due, and not being paid, the landlord, in May, sent a bailiff upon the premises for the purpose of making a distress; nothing being found on the premises, he brought an ejectment to recover possession. It was objected that, in order to establish a forfeiture, it ought to have been shown that there was no sufficient distress for fourteen days after the rent was due, as well as that the rent was in arrear, whereas it was only proved that there was no sufficient distress on one day in May, which might have been the case upon that one day only; but the court thought this was *prima facie* evidence to entitle the plaintiff to call upon the defendant to show that there was sufficient distress upon the premises, within the terms of the proviso. *Doe v. Fuchau*, 15 East, 286.

§ 709. Tender or Payment of Rent.—Effect of. — By statute in some States the tenant may regain his term, while the action of ejectment is pending or within six months after judgment therein, by bringing into court or tendering to the lessor the rent in arrear as well as the costs which have accrued in the action. And a mortgagee of the lease, or any part thereof, not in possession of the premises, who shall, within six months after the execution shall have been executed, pay the rent and costs, and perform all the agreements which ought to be performed by the first lessee, will not be affected by the recovery in ejectment.¹ Provision is also made for like relief in equity for the tenant upon similar terms of paying the costs and the rent in arrear less such rent, if any, as the lessor has received, provided moreover the bill is brought within six months after “execution executed on such judgment” in ejectment.²

§ 710. Mesne Profits, Plaintiff entitled to.—How Computed.—Separate Action for. — After a judgment in ejectment, the plaintiff is entitled to recover the mesne profits of the land, that is, a fair compensation for its use during the time he was excluded from possession by the wrongful act of the defendant. He may, also, maintain this latter action, where he obtains possession without suit, or without prosecuting an ejectment-suit to judgment; even though it should appear that he had, before the ouster, entered into an executory contract for a sale of the premises, and that the vendee was in possession at the time of the ouster.³ The plaintiff's title has relation back to the time when his right of entry first accrued, and he is considered, for all purposes of recovery, to have been in possession from that time. The possession of any one who holds him out during that time is consequently wrongful, and, by the common law, he may bring an action of trespass to re-

¹ 2 N. Y. R. S. 505, §§ 28-32. And this he may do whether the proceeding to re-enter be by action at common law, or under the statute authorizing summary proceedings. *Corning v. Beach*, 26 How. Pr. R. 289. And see *Doe v. Roe*, 3 Taunt. 402, as to the right of a mortgagee of the lease to redeem.

² 2 N. Y. R. S. 505, §§ 33-38.

³ *Leland v. Tousey*, 6 Hill, 328.

cover damages for the *mesne profits*.¹ These profits, as they are termed, prior to the day of the demise laid in the declaration, may also be recovered in an action for use and occupation, if the plaintiff thinks proper to waive the tort.² But use and occupation will not lie for rents and profits accruing subsequently to that day, as it implies a contract, and the plaintiff, having in the ejectment treated the defendant as a trespasser at a period subsequent to the demise, is estopped from also treating him as a tenant, and bringing an action for use and occupation,—the one position being manifestly inconsistent with the other.³ And when a tenant holds over after the expiration of the landlord's notice to quit, the landlord, after a recovery in ejectment, may waive his action for mesne profits, and maintain debt under the statute, for double the yearly value of the premises during the time the tenant holds over; for double value is given by way of penalty, and not as rent.⁴

§ 711. Mesne Profits, Mesne Lessee generally not liable for.

— **Defences to Action for.**—The action lies, as we have said, against any party in actual possession of the land; but where an under-tenant holds over, after the expiration of the lessee's interest, the latter is not liable for the *mesne profits*, unless he has made himself a party to the trespass, by receiving rent from the under-tenant, for the time during which he held over, or the like.⁵ The defendant in the action for *mesne*

¹ *Dewey v. Osborn*, 4 Cow. 329; *Duppa v. Mayo*, 1 Saund. 277, a.

² *Van Alen v. Rogers*, 1 Johns. Cas. 281; *Goodtitle v. North*, Doug. 584; *Doe v. Batten*, Cowp. 243.

³ *Birch v. Wright*, 1 T. R. 378, 387. Where a lessee enters upon land under a lease from one in possession claiming title, and the lessor is himself afterwards evicted by title paramount, the lessee is not liable to the real owner in an action of trespass for mesne profits. *Aden v. Thayer*, 17 Mass. 298.

⁴ *Timmins v. Rowlinson*, 3 Burr. 1603; 1 N. Y. R. S. 745, § 10. A recovery in trespass for mesne profits is only for the use and occupation of land, and does not bar an action of trespass *quare clausum fregit*, for injuries done to the premises during the same period. *Gill v. Cole*, 1 Har. & J. 403.

⁵ *Chirac v. Reinicker*, 11 Wheat. 280; *Burne v. Richardson*, 4 Taunt. 720; *Roe v. Wiggs*, 5 B. & P. 330; *Doe v. Harlow*, 12 Ad. & E. 40.

profits may plead, in bar of the claim, any matters of defence that would be available in an action of debt for rent; and, in general, anything but such as was, or might have been, controverted in the action of ejectment,—as, for instance, that he was not in possession of the premises, or, that he only remained in possession a certain time, or the like.¹ He may avail himself of the Statute of Limitations;² but a discharge under a bankrupt or insolvent law is no bar, as the action is for unliquidated damages.³ He may also deduct any ground rent that shall have been paid by him; and may set off the value of such permanent improvements made by him on the premises as he was authorized to make, to the amount of the plaintiff's claim.⁴

§ 712. Mesne Profits, Executors and Administrators as such, not liable for. — Matters of Proof in Action for. — As the action for mesne profits is in form an action of trespass, it cannot be maintained against executors and administrators for such of the profits as accrued during the lifetime of the testator or intestate;⁵ nor will a court of equity interfere to enforce the payment of them against personal representatives, when the lessor has been deprived of his legal remedy by the mere accident of the defendant's death. But where the lessor was de-

¹ *Jackson v. Randall*, 11 Johns. 405; *Jackson v. Combs*, 7 Cow. 36; *Langendyck v. Burhans*, 11 Johns. 461; *Doe v. Huddart*, 2 C. M. & R. 323; *Aslin v. Parkin*, 2 Burr. 668.

² *Hare v. Fury*, 3 Yeates, 13; *Bull. N. P.* 88; 2 R. S. 311, § 50. In trespass for mesne profits after a recovery in ejectment the plaintiff cannot give evidence of the annual value of the premises beyond the time of the lease mentioned in the declaration. *Shotwell v. Boehm*, 1 Dall. 172.

³ *Lloyd v. Peel*, 3 B. & A. 407; *Goodtitle v. North*, 2 Doug. 584.

⁴ *Jackson v. Loomis*, 4 Cow. 168; *Marie v. Semple, Addis*. 215; 2 N. Y. R. S. 311, § 49. And where the defendant has underlet, the damages which his under-tenants may claim from him are to be considered. *Killer v. Ege*, 82 Pa. St. 102. But if the tenant has made improvements on the land, under a contract with the owner, he will not be allowed for them in this action, when brought by a devisee, but must seek his compensation from the personal representatives of the devisor. *Van Alen v. Rogers*, 1 Johns. Cas. 281. See also *Hylton v. Brown*, 2 Wash. C. C. 165.

⁵ The statute of New York furnishes an exception to this rule. 2 R. S. 51.

layed from recovering in ejectment by a rule of a court of law, and by an injunction at the instance of the defendant, who ultimately failed both at law and equity, the court decreed an account of the profits against the defendant's executors.¹ The issue, when joined, is to be tried as in other cases, and if found for the plaintiff the jury will assess the damages at the amount of the *mesne profits* received by the defendant since he entered into possession. The plaintiff will be required to establish, and the defendant may controvert, the time when the defendant entered into possession, the time during which he enjoyed the profits, and the value thereof; and an ejectment will not, according to the laws of New York, be evidence of such time.² But previous to this statute, the record of the recovery in ejectment was conclusive evidence of title in the lessor of the plaintiff, from the time of the demise laid in the ejectment, and the defendant could not, in an action for *mesne profits*, show title in another after that time;³ except where the judgment in ejectment was obtained by default, in which case an entry must be proved.⁴

SECTION II.

SUMMARY PROCEEDINGS TO RECOVER POSSESSION.

§ 713. To what Cases applicable.—Determine Right of Possession merely. — The common-law remedy of ejectment, to recover the possession of demised premises, from its slow and measured progress, affords, in a great majority of cases, a very inadequate security to a landlord; for while the technical delays thereby thrown in the way prove of little or no utility to an honest tenant, they are apt to be resorted to by an unprincipled or irresponsible one, to enable him to withhold possession, and bid defiance to his landlord for an indefinite

¹ *Poultney v. Warren*, 6 Ves. 73. ² 2 R. S. 311, §§ 47, 48.

³ *Dewey v. Osborn*, 4 Cow. 329; *Jackson v. Combs*, 7 *id.* 36; *Doe v. Dupey*, 4 J. J. Marsh. 388.

⁴ *Brown v. Galloway*, 1 Pet. C. C. 291, 299; and see *Jackson v. Hills*, 8 Cow. 290.

length of time. For the purpose of remedying this evil, the legislatures of most of the States, following the English statute 11 Geo. II. § 19, have provided a summary proceeding, by which the landlord may speedily recover possession of his property, where a tenant abandons the premises during the term without surrendering the lease; continues in possession after the expiration of his term; or has become unable or unwilling to recompense the landlord for the use and occupation of the premises.¹ But these statutes are confined to the particular cases specified in them,²—the expiration of the term referred to meaning only an expiration by lapse of time, as specified in the lease, and not by a technical forfeiture; in which latter case a landlord cannot proceed under this statute, but must still resort to his action of ejectment.³ And it is to be observed also that this procedure is intended only to determine, as between a landlord and his tenant, who, for the time being, shall have the immediate possession of the dis-

¹ The statute has not abolished the formal action of ejectment in cases of this kind; but if a landlord thinks proper to resort to such an action, he must proceed strictly as at common law, and is bound to make personal service of the process upon the tenant in possession; and therefore it was held that a landlord who proceeds to obtain possession of demised premises for arrears of rent, where the premises are not actually occupied, and a declaration in ejectment cannot be served upon the lessee or his assignee, or the residence of the latter is not known, so that the service cannot be made there, must proceed as at common law, or adopt the *summary proceedings* provided by this statute; and he cannot proceed by affixing a declaration in ejectment in a conspicuous place on the demised premises, and then asking the court for a rule to plead. *Stratton v. Lord*, 22 Wend. 611; overruling the case of *Evans v. Moran*, 12 *id.* 180.

² The summary proceeding given by statute is in derogation of the common law, and, when questioned, the necessary jurisdiction must appear on the face of the record, or the proceeding is *coram non judice*, and void. *Graver v. Fehr*, 89 Pa. St. 460.

³ *Oakley v. Schoonmaker*, 15 Wend. 226. But this is otherwise in several States by statute; see *post*, § 728 *a*, note, § 6. In Louisiana, where rent is said to be of the essence of the contract of lease, and a lessee refuses to comply with its terms, by withholding the rent as it comes due, the lessor may have a summary judgment rescinding the contract and restoring the possession: *Chase v. Turner*, 10 La. 19; *Dresden v. Cox*, 7 *Martin*, 149; without a demand of rent on the day it is due, or any notice to quit: *Hyde v. Palmer*, 12 La. 359.

puted premises.¹ The decision of the justice is *pro hac vice*, and nothing more, and either of the parties can in any subsequent legal investigation deny or disprove, if it becomes necessary, the facts upon which his judgment was based.²

§ 714. New York.—Lessor when entitled to Possession.—And first, with respect to a vacant possession, we may observe, that although a lessor may re-enter without taking any legal proceeding in case the tenant quits the premises without any intention of returning,³ yet, at common law, he had strictly no right to re-enter before the expiration of the term, even if the tenant had deserted the premises.⁴ With a view of obviating the difficulty of ascertaining the tenant's intention, the New York statute provides that if any tenant, being in arrear for rent, shall desert the demised premises, and leave the same unoccupied and uncultivated, without any goods thereon subject to distress to satisfy the arrears of rent, any justice of the peace of the county may, at the request of the landlord, and upon due proof that the premises have been so deserted, leaving such rent in arrear, and no goods thereon subject to distress, go and view the premises; and upon being satisfied that the premises have been deserted,

¹ The statute requirement of a recognizance to pay rent and damages of a defendant pleading title in landlord-and-tenant process, in the event of the plaintiff's prevailing, does not estop the plaintiff to deny the existence of the defendant's tenancy or to assert his own right of possession. *Robinson v. Morgan*, 58 N. H.

² But a judgment of dispossession in summary process is a defence to an action subsequently brought by the tenant against the lessor to recover damages for the breach of an oral agreement alleged to have been made by the latter, and inconsistent with the facts concluded by the judgment, that is, of tenancy, of non-payment of rent, and of holding over. *Nemetty v. Naylor*, 63 How. Pr. 387. So the record of judgment in summary process is conclusive that the tenant was in possession at the time, as tenant of the plaintiff, and in such possession up to the boundary line of the demised premises. *Richmond v. Stable*, 48 Conn. 22.

³ *Lacey v. Lear*, Peake's Add. Cases, 210.

⁴ *Brown v. Kite*, 2 Overt. 233; *Stratton v. Lord*, 22 Wend. 611. See *ante*, § 531. Such an abandonment may or may not amount to a surrender. *McKinney v. Reader*, 7 Watts, 128; *Talbot v. Whipple*, 14 Allen, 177.

he must affix a notice in writing upon a conspicuous part of the premises, requiring the tenant to appear and pay the rent due, at some time in the said notice specified, not less than five nor more than twenty days after the date thereof. At the time specified in the notice, the justice must again view the premises ; if the tenant then appears and denies that any rent is due to the landlord, all proceedings must cease. If, upon such second view, the tenant, or some one for him, shall not appear and pay the rent in arrear, and there shall not be sufficient distress on the premises to satisfy the rent, then the justice may put the landlord into possession ; and the demise of the premises to such tenant shall thenceforth become void.¹

§ 715. Vacant Possession, what amounts to.— Proceedings as upon a vacant possession can only be taken where the premises are actually abandoned by the former occupant ; if he retains virtual possession, though he does not occupy personally, the landlord must proceed in the regular way pointed out in the statute.² What amounts to a vacant possession is sometimes difficult to determine. At common law, the mere fact of a tenant's not living upon the premises would not have amounted to a desertion, provided he still occupied them by his goods. Thus, where a publican removed to another house, and left beer in the cellar ; or where hay was left in a barn ; or it was not known where the tenant lived ; or any person

¹ 2 N. Y. R. S. 512, §§ 24-27; 4 Geo. II. c. 28. An appeal from the proceedings of any justice in such case may be made by the tenant at any time within three months after such possession has been delivered, to the county court of the county where the land is situated, by serving notice thereof in writing upon such justice, and by giving security to be approved by such justice to pay the landlord all costs of such appeal which may be adjudged against the tenant; and thereupon the justice shall return the proceedings had before him to the said court, within ten days after such notice and security given, and shall give notice to the landlord of such appeal. The court must then examine the proceedings, and hear the proofs and allegations of the parties in a summary way; and may order restitution to be made to the tenant, with costs to be paid by the landlord; or in case of affirming the proceedings, may award costs against the tenant.

² Doe v. Roe, 2 Dowl. Pr. R. 399, 431; s. c. 3 *id.* 691; 4 *id.* 173.

was left on the premises to take care of them,—the possession was held not to be vacant.¹ But where a party abandoned the house with his goods, and locked it up, and it was not known where he had gone, it was held to be a clear case of vacant possession.² And it was so held in another case, where the tenant ceased to reside on the premises for some months, and left them without sufficient property to answer the year's rent; although the landlord knew where the tenant was, and a servant of the tenant's was found upon the premises when the justice went to view them.³

§ 716. Statutory Proceeding on Vacant Possession.—It will be observed that the statute referred to only gives the remedy in case the tenant deserts the premises, leaving *no sufficient distress* thereon. But since the abolition of distress for rent, that provision of the statute has become virtually obsolete, and where the premises are entirely abandoned, it is now unnecessary for a claimant who has a right of possession to proceed under any legal process; for he may enter upon the premises unaided by the law if he can find an opportunity of doing so without using force; and if trespass should be brought against him, he may justify the entry under his title.⁴ In one case, the tenant having absconded while rent was in arrear, the landlord entered into the premises, and then brought an action under the statute in order to bar the tenant's right, as if the premises had not been vacant,—it was held, on a motion to set aside the judgment and execution for irregularity, that in the eye of the law the premises were vacant, and the whole proceeding was an absolute nullity.⁵ But in an action of ejectment for lands belonging to the Holland Land Company, which had been surveyed, and buildings

¹ *Savage v. Dent*, 2 Stra. 1064; *Doe v. Roe*, 2 Chit. 179.

² *Doe v. Cock*, 4 B. & C. 259.

³ *Ex parte Pilton*, 1 B. & A. 369.

⁴ *Taunton v. Costar*, 7 T. R. 431; *Taylor v. Cole*, 3 *id.* 292; *Rogers v. Pitcher*, 6 *Taunt.* 202; *Turner v. Meymott*, 1 *Bing.* 158. And the better doctrine is that the lessor may do this, even if the premises are still occupied by the tenant, if the term of the latter has expired. See *ante*, §§ 531, 532.

⁵ *Jackson v. Hakes*, 2 *Caines*, 335.

erected on some part of the tract by the company, the proceedings being as for a vacant possession, the court made a rule to admit the company in the place of the defendant, observing that the strict principles applicable to proceedings in ejectment, as for a vacant possession in England, cannot, without manifest hardship and inconvenience, be applied to the unsettled lands of this country.¹

§ 717. Forcible Entry and Detainer distinguished from Summary Process. — And with respect to the summary proceedings by which a tenant may be removed from the demised premises, in case he holds over after the expiration of his term or refuses to pay rent, we observe that many of the States have adopted substantially the ordinary provisions of the English statutes relating to a forcible entry and detainer, and have made them applicable to all cases of an unlawful detention of property.²

¹ *Saltonstall v. White*, 1 Johns. Cas. 221; *Wood v. Wood*, 9 Johns. 257.

² In England, the process upon a forcible entry or detainer is a criminal proceeding merely. It only lies where force or violence has been used either in the entry or detainer; and upon conviction thereof a fine is imposed, and a writ of restitution awarded. 2 Chitty, Stat. 121-124; *Yager v. Wilber*, 8 Ohio, 398, 400. And this is also the case in a few of the United States. Thus, in Pennsylvania: see *Purdon*, Dig. 1861, p. 221, and *North Carolina*; while the summary process for recovery by landlords of demised premises is by a separate statute: *id.* p. 613; *Turner v. Lowe*, 61 N. C. 413. See *Meroney v. Wright*, 81 *id.* 390; *Hughes v. Mason*, 84 *id.* 472. But in most of the United States, the proceeding upon forcible entry or detainer is a civil process for restitution: *Harrow v. Baker*, 2 *Greene* (Iowa), 201; conforming so far, however, to its original, that it is generally begun by sworn complaint instead of a writ and summons, and a fine may be imposed, but intended mainly to restore possession to the person unlawfully deprived thereof. Hence, the summary proceeding for restitution to the landlord of the demised premises, unlawfully withheld, as it contemplated the same object, though on different grounds, was generally incorporated in the same enactment. This is the case in Maine, Massachusetts, Vermont, New Hampshire, Rhode Island, Ohio, Indiana, Illinois, Missouri, Kentucky, Wisconsin, Iowa, Michigan, California, Nevada, and Alabama. On the other hand, in New York, Connecticut, New Jersey, North Carolina, and Georgia, the process for landlords and that upon forcible entry, etc., are given in separate statutes. But, as in the former States, the cases in which each process lies are specifically and separately set forth and distinguished one from another, there does not seem much distinction between the statutory enactments of the former

But this latter proceeding, as we shall presently see, partakes rather of the nature of a criminal prosecution for the punish-

and latter class of States, especially as in each class substantially the same form of proceeding, pleadings, etc., is required in the case of process by landlords and that upon forcible entry or detainer. In all these States, to entitle the complainant to avail himself of this process, there must be shown either the relation of landlord and tenant, or force either in the entry or in the detainer after a peaceable entry. *Andrae v. Heinritz*, 19 Mo. 390; *Young v. Smith*, 28 *id.* 65; *Dudley v. Lee*, 39 Ill. 343; *Steiner v. Priddy*, 28 *id.* 179; *Powers v. Sutherland*, 1 Duvall, 151. In some States, however, the statutory prohibition has been extended to include any "unlawful" entry or detainer, and not merely those made with "force or the strong hand." Thus in Ohio, *McGarvey v. Pickett*, 27 Ohio St. 669; *Justice v. Low*, 26 *id.* 372. So in California, Comp. Laws, 1853, c. 36, § 2, recovery is given whenever there has been "unlawful or forcible entry and detainer," or "lawful and peaceable entry and unlawful detainer." Therefore peaceable possession for a year is no answer to this process, unless when specifically for force. *Johnson v. Chely*, 43 Cal. 300. In Indiana, also, 2 Gavin & H. Stat. p. 632, § 12, recovery is given in case of "unlawful or forcible entry," and "peaceable or forcible detainer," the act being entitled, "concerning the unlawful detention of lands," etc. Yet both of these statutes have been construed to exclude recovery by landlords for merely unlawful detainer after peaceable entry, and to allow process only where actual force has been used by the lessee, the word "unlawful" in the former statute being construed "forcible," and "or" in the latter, "and." *McEvoy v. Igo*, 27 Cal. 375; *Short v. Biddwell*, 15 Ind. 211. So in Wisconsin, § 2 of Rev. Stat. 1858, c. 151, which gives process against those who make "unlawful or forcible entry into lands, and detain the same, and against those who having lawful and peaceable entry, etc., unlawfully detain the same," received the same restricted construction. *Gates v. Winslow*, 1 Wisc. 650; *Jarvis v. Hamilton*, 16 *id.* 574. Similarly broad language is used in the statutes of New Hampshire, Gen. Stat. 1857, c. 231, § 23. In *Perkins v. Towle*, 58 N. H. 425, this statute was pronounced unconstitutional. The act empowered justices of the peace to summon the tenant in all real and possessory actions, and to try all questions as to the right of immediate possession except the question of title; and the defendant might have a jury trial on plea of title, or appeal, only by giving security, not merely to prosecute his appeal, but to pay rent and damages in the event of a final judgment against him. This requirement was held to be a substantial interference with the right of jury trial under the constitution of New Hampshire. A similar provision exists in New Jersey, *post*, § 786, note. And this is expressly declared in the statutes of Vermont, Gen. Stat. 1832, c. 46, § 13, with regard to a similar clause. In several States, however, a provision against "unlawful detainer" is the only clause under which this process

ment of wrong-doing than of a civil action for the restoration of a simple right. For this reason, New York, adhering to this well-defined distinction of remedies, retains the old procedure of forcible entry and detainer, while she has a separate proceeding for the removal of a tenant. Her statute enacts, "any tenant or lessee, at will or at sufferance, or for part of a year, or for one or more years, of any houses, lands, or tenements; and the assigns, under-tenants, or legal representatives of such tenant or lessee may be removed from such premises by any judge of the Supreme Court, or of the county courts of the county; or by any justice of the peace, mayor, or recorder of the city where such premises are situated; or, if in the city of New York, by the mayor, recorder, city judge, any justice of the marine court, or any one of the justices of the district courts of that city, in the manner hereafter prescribed in the following cases:¹ 1. Where such person shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of the landlord; 2. Where he shall hold over, without such permission, after any default in the payment of rent, pursuant to the agreement under which the premises are held, and a demand for the rent shall have been made, or three days' notice in writing requiring the payment of such rent, or the possession of the premises, shall have been served by the persons entitled to the rent on the person owing the same, in the manner prescribed for the service of summons hereinafter described; 3. Where the tenant or lessee of a term of three years, or less, shall have taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment during such term; 4. Where any person shall hold over and continue in the possession of any real

for summary repossession is given to lessors. Thus, in *Kentucky*, Code, § 500; *Illinois*, Stat. 1857, vol. i., p. 521, § 1; *Maine*, Rev. Stat. 1857, c. 94, § 1; but these are not considered applicable to forcible entry or detainer. It seems, therefore, that the two classes of proceeding are uniformly kept distinct.

¹ Proceedings may also be taken before the city judge of Brooklyn, or before any justice of the Superior Court of the city of Buffalo, where the premises are situated within those cities respectively. Laws, 1849, p. 174; 1857, p. 754.

estate which shall have been sold by virtue of an execution against such person, after a title under the sale shall have been perfected.”¹

§ 718. Notice in Writing a Pre-requisite to Statutory Proceeding.—We have seen that a notice in writing is required to be given to a tenant at will, or from year to year, in order to put an end to tenancies of this description. And it is only after the expiration of such a notice that the tenant can be said to be holding over, or that an application can be made for a process to remove him, under the first subdivision of this section.² But where a tenant for a year holds over after the expiration of his term without the landlord’s permission, he is not entitled to notice, since he is not considered a tenant within the meaning of the statute; and to entitle him to notice at all, the holding over must be continued for such length of time after the expiration of the term as to authorize the implication of an assent on the part of the landlord to such continuance.³ And where a landlord waited three months and twelve days before instituting proceedings, he was held not to

¹ 2 R. S. 513, § 28. Within this statute, as amended by c. 101, Laws of 1879, any person in possession under the title which the purchaser has acquired is a tenant, and may be removed. This rule applies equally to the judgment debtor and all who hold under him, under pretence of a title acquired from him before the judgment. The rule was applied to one holding title from a receiver, appointed in an action brought by executors having a leasehold interest, such interest having been sold upon execution. *People v. McAdam*, 84 N. Y. 287. This proceeding is also made applicable to cases for the removal of tenants or occupants of houses kept for immoral or unlawful purposes. Laws of 1868, p. 1724; *ante*, § 521. By the act of 1862, c. 828, it is extended to corporations. *Brown v. Mayor*, 66 N. Y. 385. A pier or wharf is a tenement within the meaning of the statute. *People v. Kelsey*, 38 Barb. 269.

² In Pennsylvania, under the acts of 1772 and 1863, three months’ notice is required, which *semble* is not waivable. *Gault v. Neale*, 6 Phila. 61. So the notice under act of 1830 for rent five days in arrear is not to be waived. *McCloud v. Jaggers*, 3 Phila. 304.

³ *Smith v. Littlefield*, 51 N. Y. 539. In case of a tenant from year to year holding over after notice to quit, the same notice which determines the tenancy is a sufficient demand and notice under the statute of New Jersey to support a complaint of unlawful detainer. *Townley v. Rutan*, 1 Zab. 674.

be chargeable with laches, especially since it appeared that he had attempted to obtain possession without recourse to coercive measures.¹ If the tenant has agreed to pay rent in advance, and holds upon condition that if he fails to do so he will leave the premises, he is liable to removal at once, and without notice.² Where the default consists merely in the non-payment of rent, it must also be shown that the party entitled to receive it has demanded it when due, or, if he has not so demanded it, that he has served three days' notice in writing requiring its payment, or the possession of the premises; there need not, however, be both a demand and notice.³

¹ *Rowan v. Lytle*, 11 Wend. 616. Statutes similar to that of New York, requiring written notice or demand to tenants at sufferance before summary process lies, exist in *Michigan*, where seven days' notice must be given: St. 1867, §§ 4985, 8295, subd. 2; *Raynor v. Hazzard*, 18 Mich. 72; *Judd v. Farris*, 53 *id.* 518; *Wisconsin*: Rev. Stat. 1858, c. 89, § 34; *Georgia*: Rev. Code, 1868, § 4005; and *New Jersey*: Nixon's Dig. 1861, p. 454, § 1. In the three latter States, as in those States where a written demand must in every case precede the process,—see *post*, § 728 *a*, note, § 3,—this is not perhaps open to objection. In *Michigan*, however, as in *New York*, the same statute which requires notice to tenants at sufferance does not require it against tenants who hold over a definite term. But every tenant who enters by right and holds over a definite term is a tenant at sufferance, and in most States has no notice before process lies for his removal, as he is already aware of the conclusion of his term by its express period of determination. *Kinsley v. Ames*, 2 Met. 29; *Hollis v. Pool*, 3 *id.* 350; *Dunning v. Finson*, 46 Me. 546; *Alexander v. Westcott*, 37 Mo. 108. The court in *New York*, in the case cited, pressed by the language of the statute on the one hand, and by the absurdity of notifying a tenant who was perfectly aware of the termination of his title on the other, held that a tenant did not become a tenant at sufferance, and so entitled to notice under the statute, until he had held over long enough to impute laches to the owner, and was intermediately a trespasser, liable to summary expulsion without notice.

² *Elliott v. Stone*, 1 Gray, 571.

³ *Rogers v. Lynde*, 14 Wend. 172. In *Massachusetts*, the notice required by statute is held sufficient without further demand: *Borden v. Sackett*, 113 Mass. 214; and it does not prevent the landlord from availing himself of this process, that he owes the tenant more than the rent due: *id.* Where a landlord after service of notice accepted rent which accrued subsequent to the notice, it was held to be a waiver of the notice; it would have been otherwise, however, if the acceptance had been stated to be conditional. *Prindle v. Anderson*, 19 Wend. 391; *Hunter v. Oster-*

The demand may be made of the tenant in possession, and the notice may be served upon him, although he is not the lessee; and if two tenants hold possession jointly, a demand on one of them is sufficient.¹ The notice must be delivered to the tenant, or to some person of proper age residing upon the premises; or, if the tenant cannot be found, and there is no such person residing on the premises, it may be served by affixing the notice upon a conspicuous part of the premises, where it may be conveniently read.²

§ 719. Jurisdiction.—Statutory Liability of Judges. — The jurisdiction of the assistant judges of the city of New York under this section extends over the whole city, and is not limited to the wards for which they were appointed; and it is immaterial where the parties reside, or the premises are situated.³ But any judge who issues a warrant to dispossess a person, without having properly obtained jurisdiction of the matter, is a trespasser, and liable to an action, although the person dispossessed came illegally into possession.⁴ And even

houdt, 11 Barb. 33. But a failure to pay the taxes covenanted to be paid by the tenant in addition to rent does not authorize a proceeding under this statute. *People v. Swayze*, 15 Abb. Pr. R. 432.

¹ *Geisler v. Acosta*, 9 N. Y. 227. The demand of rent, as distinguished from the notice in writing, means a personal demand. *Simon v. Gross*, 50 Barb. 231.

² This notice is required to be served in the same manner as a summons is served; as to which, see *post*, § 722. The statute, it will be observed, is in the alternative that a demand of rent has been made, or notice in writing given; and forasmuch as doubts are suggested whether the demand should not in all cases be a strict common-law demand, it will generally be prudent to base the proceeding upon notice, wherever a doubt exists as to the sufficiency of the demand. For various forms of notice to quit, see Appendix XXVIII.

³ *Roach v. Cosine*, 9 Wend. 227.

⁴ *Evertson v. Sutton*, 5 Wend. 281. In *Beach v. Nixon*, 9 N. Y. 35, there was a clause in the lease authorizing the landlord to proceed and dispossess the tenant under this statute, upon the breach of any of the conditions therein contained; but the Court of Appeals held that such a covenant could not confer jurisdiction to proceed under this statute, nor preclude the lessee from objecting a want of jurisdiction; that the law, and not the consent of parties, confers jurisdiction, and that the rule could have no practical force if consent given in any form could preclude inquiry

if the tenant appears, and litigates the matter upon its merits, without objecting to the jurisdiction, still the magistrate gets no jurisdiction, unless it is conferred by the affidavit.¹ As a general rule, however, where the subject-matter of a suit appears to be within the jurisdiction of the court, but the want of jurisdiction is to the person or place, unless such defect appears on the process given to the officer who executes it, he is not a trespasser; but where the subject-matter is not within the jurisdiction, everything done under the warrant is absolutely void, and the officer is a trespasser.²

§ 720. When Proceedings lie. — The statute applies only to cases where the conventional relation of landlord and tenant subsists, and not where it is created by mere operation of law;³ to leases on which rent is distinctly reserved, and not to cases where the rent reserved is so uncertain as to require the intervention of a jury to render it certain.⁴ It does not lie against one who entered as a trespasser, in hostility to the rights of the landlord; nor can it be substituted for an action of ejectment in case of a forfeiture of the term.⁵ It applies, however, in favor of assignees of the reversion, as well as of the lease, as to the lawfulness of the jurisdiction; and see *Van Rensselaer v. Snyder*, 13 N. Y. 299, 304.

¹ *Campbell v. Mallory*, 22 How. Pr. R. 183.

² Case of the Marshalsea, 10 Co. 75; Hardr. 480; *Evertson v. Sutton*, *supra*.

³ *Birdsall v. Phillips*, 17 Wend. 464; *People v. Simpson*, 28 N. Y. 55; *Walls v. Preston*, 28 Cal. 224. So the assignee of rent is not entitled to this remedy, but the reversioner still is, notwithstanding the assignment. *Chamberlin v. Brown*, 2 Doug. (Mich.) 120. In Maine, Rev. Stats. 1857, c. 94, § 2; *Dunning v. Finson*, 46 Me. 546, and New Hampshire, Rev. Stat. c. 209, the relation of landlord and tenant must be proved to exist. *Stockbridge v. Nute*, 20 N. H. 271.

⁴ *McGee v. Fefsler*, 1 Pa. St. 126; *Oakley v. Schoonmaker*, 15 Wend. 226.

⁵ *Carlisle v. McCall*, 1 Hilt. 399; *Oakley v. Schoonmaker*, *supra*. So not against one who enters after the tenant has abandoned the premises, though professing to hold under the lessee. *People v. Hovey*, 4 Lans. 86. So not against a mere servant or custodian. *M'Quade v. Emmons*, 38 N. J. 397; *Reeder v. Bell*, 7 Bush, 255. So where one has been evicted by the paramount title, and has attorned to him, he is not liable thereafter to his original lessor. *Steinback v. Krone*, 36 Cal. 303.

for they succeed to all the rights of the original landlord;¹ and includes the case of a judgment debtor, who retains possession of the property after a sale on execution.² But where the case made by the affidavit of the claimant showed that the alleged tenant had conveyed the premises to the party who instituted the proceedings, stipulating that he should retain possession until a certain period, and stated that he held over and continued in possession, although that period had elapsed, and had received a month's notice to quit,—it was held that these facts did not constitute a tenancy within the statute, and that the officer had no jurisdiction.³ For a similar reason, a mortgagor cannot be turned out of possession of the mortgaged premises under this statute, for a mortgagor

¹ *Walter v. Van Winkle*, 10 Martin, 289; *Brown v. Betts*, 13 Wend. 29. This is so either by the express adoption of the Statute of Anne, dispensing with attornment, *ante*, § 442, or by the terms of the statutes giving the summary remedy. This is the case in *Indiana*: 2 *Gavin & H. Stat.* p. 358, §§ 7, 10; *Illinois*: Stat. Feb. 16, 1865, § 4; *Dudley v. Lee*, 39 Ill. 339; in favor even of a reversionary lessee: *Ball v. Chadwick*, 46 Ill. 28; *Kentucky*: Rev. Code, § 501; *McMurtry v. Adams*, 3 *Bush*, 70; though formerly otherwise: *Helm v. Slader*, 1 A. K. Marsh. 320; *Pennsylvania*: *Purdon*, Dig. 1861, p. 613, § 18; though only when the proceeding is under the act of March 21, 1772: *De Coursey v. Guar. Tr. Co.*, 81 Pa. St. 217; the acts of April 3, 1830, and Dec. 14, 1863, being limited to the lessor: *Cooke v. McDevitt*, 6 *Phila.* 131; *Hopkinson v. McLellan*, 8 *id.* 302; the former act not applying even to a devisee: *May v. Kendall*, *id.* 244. This remedy is given to assignees also in *Connecticut*: Gen. Stat. 1866, tit. 1, § 352; *Missouri*: 2 *Wagner*, Stat. 883–884, §§ 38, 39; *Maine* and *New Hampshire*: *ubi supra*; and probably in *Vermont*, *Michigan*, *Ohio*, *Georgia*, and *Alabama*, where the process is given in terms to the one “entitled to possession,” and not to the lessor. In *California*, however, the remedy is confined to the original lessor. *Reay v. Cotter*, 29 Cal. 168; and the law is the same wherever neither the Statute of Anne is adopted, nor the remedy extended to assigns by express terms of the statute.

² *Spraker v. Cook*, 16 N. Y. 567.

³ *Sims v. Humphrey*, 4 Den. 185; *Macniels v. Wallace*, 66 N. C. 587. See *People v. Simpson*, 14 Abb. Pr. R. 457. Where one of two joint lessors becomes sole owner, he may demand the whole rent, and on a refusal, may dispossess the tenant. Indeed, where the letting is joint, there can be no division of the rent as to the tenant; and a demand may be by either of the lessors, but it must be of the whole rent, and not of an undivided portion of it. *Griffin v. Clark*, 33 Barb. 46.

is not a tenant.¹ And where the occupant of land, instead of a reservation of certain rent, agreed to work the farm upon shares, he was not considered a tenant within the meaning of this statute, and could not be removed for non-compliance with the terms of his agreement.² So also of a conditional agreement to purchase real estate, where the purchaser made default in payment, and being in possession, held over after notice and demand.³ Nor can such a proceeding be instituted, on the ground of the expiration of the term by a forfeiture, upon the breach of a condition; for the expiration of the term mentioned in the statute means an expiration by lapse of time.⁴ Where a tenancy at will exists, and the landlord's interest in the estate has been sold under an execution, the relation of landlord and tenant still subsists so far that the purchaser under the sheriff may proceed to obtain possession under this statute.⁵ Tenants from year to year are also, for the purposes of this proceeding, to be considered as tenants at will, and may be removed, upon a month's notice to quit, terminating with the year of the tenant's holding.⁶ So, an

¹ *Roach v. Cosine*, 9 Wend. 227; *Greer v. Wilbur*, 72 N. C. 592; *Johnson v. Hanser*, 82 N. C. 375; and a lessee may show that the lease was given as part of the mortgage transaction: *People v. Howatt*, 20 Hun, 138. In those States where the same process lies for summary repossession by the landlord as for forcible entry or detainer, *ante*, § 717, n. 3, the mortgagee or his vendee can only maintain this process when they have obtained possession in part. *Boyle v. Boyle*, 121 Mass. 85; *Woodside v. Ridgeway*, 126 *id.* 292; and see *post*, § 789.

² *Roach v. Cosine*, *supra*.

³ *Williams v. Bigelow*, 11 How. Pr. R. 84. So a vendee in possession before receiving his deed: *ante*, § 25, and note 1; *Macnials v. Wallace*, *supra*.

⁴ *Oakley v. Schoonmaker*, 15 Wend. 226; *Benjamin v. Benjamin*, 5 N. Y. 388; *Penoyer v. Brown*, 13 Abb. N. C. 82. This is otherwise, however, in some other States. See *post*, § 728 *a*, note, § 6, statutes and cases cited.

⁵ *Birdsall v. Phillips*, *supra*. This proceeding may be taken by any person in whom the title is at the time of its commencement, and is not limited to the purchaser under the execution. *Brown v. Betts*, *supra*. So in Massachusetts a purchaser from a lessor at will, though the will is thereby ended, may have this process. *Howard v. Merriam*, 5 Cush. 563. So in Maine. *Dunning v. Finson*, 46 Me. 546.

⁶ *Prouty v. Prouty*, 5 How. Pr. R. 81. A provision in a lease that the lessor may terminate the lease at the end of any year, by giving sixty

owner of land, who agrees that his creditor may occupy a dwelling-house belonging to him for the term of one year, and until he pays a mortgage which the creditor holds against him, may proceed under this statute to obtain possession, on payment of the money after the first year, and on the refusal of the creditor to yield up the possession; for in such a case it is at the election of the owner to put an end to the term at any time after the first year, by paying the mortgage, although the money should not be due for four years.¹ But after dis-training for rent in arrear, is a landlord at liberty to institute proceedings under this statute, to remove the tenant, notwithstanding the distress may have proved insufficient to satisfy the rent? for when a forfeiture has accrued upon a clause of re-entry, for rent in arrear, the forfeiture will be waived if the landlord afterwards does anything which amounts to an acknowledgment of a subsisting tenancy.²

§ 720 a. Plaintiff must be entitled to Immediate Possession.— The person instituting the proceeding must be entitled to the immediate possession of the premises; and where he is merely the owner of a reversion, expectant on the termination of the estate of the tenant for life, who is in the actual possession of the premises, he cannot institute proceedings against one to whom he has assumed to let the same.³ And it must appear that the tenant holds under the agreement pursuant to which the rent is claimed to be due, at the time the proceedings are instituted; for if the tenant is then holding under some new agreement with the landlord, he cannot be dispossessed under the statute, on the ground that he is in default in the payment days' previous notice, in case he should sell or desire to rebuild, is in the nature of a limitation, and the term expires by power of a sale and notice, in sixty days, without any further act on the part of the lessor. And if the tenant retains possession after the sixty days, he holds over under the provisions of the statute, and is subject to removal. The relation of landlord and tenant continues to exist so long as the legal title has not actually passed from the lessor. *Miller v. Levi*, 44 N. Y. 489.

¹ *Hunt v. Comstock*, 15 Wend. 665.

² *Wilder v. Ewbank*, 21 Wend. 587; *Jackson v. Sheldon*, 5 Cow. 428.

³ *Buck v. Binninger*, 3 Barb. 391. This proceeding does not lie against a tenant for life, nor in Pennsylvania against a tenant in fee for the non-payment of a ground rent. *McDermott v. McIlvaine*, 75 Pa. St. 341.

of rent under a prior agreement.¹ The mortgage by a landlord of his interest in the premises does not alter his relations to the tenant until after foreclosure of the mortgage; nor will a sale of the landlord's interest under execution change that relation until the sale becomes absolute.²

§ 721. Statutory Proof Required. — As a preliminary to this proceeding, the statute requires the landlord or lessor, his legal representatives, agents, or assigns, to make oath in writing of the facts which, according to the preceding sections, authorize the removal of the tenant,—together with a description of the premises claimed, and present the same to one of the officers above specified. With respect to this affidavit, great particularity is required; and every fact necessary to bring the case within the statute, and to give the officer jurisdiction, must be distinctly stated.³ Without such affidavit, the landlord, as well as the magistrate and the officer who executes the warrant, will be considered trespassers.⁴ And in

¹ *Burnett v. Scribner*, 16 Barb. 621. Where a tenant under a yearly hiring died, leaving his widow in possession, which she retained during the unexpired term, and there was no administration, it was held that she was, *prima facie*, an assignee of the term, and that she might be removed by summary proceedings, as an overholding tenant. *Michenfelder v. Gunther*, 66 How. Pr. 464.

² *Evertsen v. Sawyer*, 2 Wend. 507. Where part of the premises were leased by parol to a monthly tenant, and subsequently the landlord leased the whole premises to another tenant, term to commence on the first day of May thereafter, at the same time giving notice to the first tenant that his term would expire on that day, the landlord, and not his lessee, is the proper person to institute proceedings to recover possession by reason of the monthly tenant holding over after the first of May. *Imbert v. Hallock*, 23 How. Pr. R. 456; and see *Griffin v. Clark*, 33 Barb. 46; *supra*, § 720; and *Crary, Spec. Proced. c. 30.*

³ *Hallenbeck v. Garner*, 20 Wend. 22; *People v. Mathews*, 38 N. Y. 451; *McDermott v. McIlvaine*, 75 Pa. St. 341; *Hill v. Stocking*, 6 Hill, 317. Every fact necessary to show that the justice had jurisdiction of the case must appear on the record. *Hopper v. Chamberlain*, 34 N. J. 221. So in Pennsylvania, under the act of 1863: *McGrath v. Donnelly*, 7 Phila. 43; *McGinnis v. Vernon*, 67 Pa. St. 149; or of 1825: *Uber v. Hickson*, 6 Phila. 132; *Erety v. Wiltbank*, 8 *id.* 300.

⁴ *McCoy v. Hyde*, 8 Cow. 68. Notwithstanding that the person dispossessed came illegally into possession. *Evertson v. Sutton*, 5 Wend. 281. Precedents of this affidavit will be found in Appendix XXXII.

a case of this kind, where the plaintiff had been forcibly dispossessed and the proceedings were reversed, the defendant having in the meantime torn down and destroyed a building erected by the plaintiff upon the demised premises, the defendant was held liable for all damages which were the direct result of his acts, including the value of the building and of the unexpired term.¹ As a general rule of law, however, applicable to all affidavits of this character, it may be stated that where certain facts are required to be proved, to warrant the issuing of process, by a court of special or limited jurisdiction, if there be a total defect of proof as to any essential point, the process will be void; but where the proof, though slight and inconclusive, legally tends to establish all the essential facts, the process will be valid when questioned collaterally; and can only be avoided by a direct proceeding to set it aside.²

§ 721 a. Particulars of Affidavit.—The facts, and not the evidence of facts, should be set forth in this affidavit, and must state a plain case; for where an affidavit stated that B. demised the premises and afterwards died, leaving his widow, who, after B.'s death, became legally possessed of the lease, and entitled to receive the accruing rents, "and is now entitled to possession of premises," and further stated that the tenant and those claiming under him had, by paying rent, recognized A.'s right,—it was held that the affidavit was insufficient, because the first part of the affidavit did not swear to facts, but merely to matter of law, and that it should have shown how B. became possessed, either as heir, devisee, or the like; and that the second part of the affidavit was bad, because it was not a statement of facts but of evidence.³ The

¹ *Eten v. Luyster*, 60 N. Y. 252.

² *Miller v. Brinkerhoff*, 4 Den. 118; *Matter of Ferguson*, 2 Johns. 239.

³ *Hill v. Stocking*, 6 Hill, 317. When a man wishes to put another out of a dwelling-house, upon an affidavit and notice of two hours, it is not too much to require that he should make out a plain case in his affidavit, especially as he is allowed to be his own witness. These summary proceedings must be carefully watched, or they may be turned into a means of working great injustice and oppression. Per Bronson, J., in *Duel v. Rust*, 24 Barb. 438.

affidavit must not be uncertain or contradictory, but must show that the relation of landlord and tenant exists between the parties, specifying which of the persons proceeded against is tenant, and which of them is an under-tenant.¹ It should allege that the applicant for the warrant was the owner of the premises at the time of the demise,—or, if not, that he has since become entitled thereto, showing how,²—and must show that the defendant is in possession and how, in order that the officer before whom the proceeding is had may judge whether it comes within the statutory description.³ It should state the name of the person intended to be removed, and that he is in the occupation of the premises, showing his relation to the landlord;⁴ and when the application is on the ground of the non-payment of rent, it should name the person of whom the rent has been demanded, when a demand is necessary, specifying the time when the demand was made; but if defective in these particulars, and yet states the demand to have been made upon the land, it cannot be objected to collaterally,—for the remedy, if any, is by *certiorari*.⁵ When the oath is made by an agent, it is not sufficient that he describes himself as agent, but the fact that he is the agent must be distinctly sworn to.⁶ It is insufficient also, if it omits to state

¹ *People v. Mathews*, 43 Barb. 168; *People v. Simpson*, 28 N. Y. 55; *Wiggin v. Woodruff*, 16 Barb. 474.

² *Buck v. Binninger*, 3 Barb. 391; *Hallenbeck v. Garner*, 20 Wend. 22.

³ *Wiggin v. Woodruff*, *supra*. But it is not sufficient to swear that the defendant is *her tenant*, and holds over the premises heretofore leased to *him*, his term having expired; for these are but the claimant's conclusions from facts which are not disclosed. *Fowler v. Roe*, 1 Dutch. 549; *Shepherd v. Sliker*, 31 N. J. 432.

⁴ *Hill v. Stocking*, *supra*.

⁵ *Rogers v. Lynde*, 14 Wend. 172; *Fowler v. Roe*, 1 Dutch. 549. In New Jersey, where the proceeding is for non-payment of rent, the affidavit must state as a fact that satisfaction for the rent cannot be obtained by distress; a mere statement of belief is not sufficient. *Schuyler v. Tre-fan*, 2 Dutch. 213. For a further statement of the particulars required of this affidavit, see *Fowler v. Roe*, *supra*; *Brahn v. Jersey City Forge Co.*, 38 N. J. 74. See also *Evans v. Muller*, 25 Mo. 195; *Jackson v. Adams*, 1 Wils. (Ind.) 398.

⁶ *Cunningham v. Goelet*, 4 Den. 71; *Wyman v. Johnson*, 1 Thomp. & C. 578.

that the holding-over is without the permission of the landlord; and it is not enough that a mere probable want of permission to hold over appears.¹ The premises must also be described with sufficient certainty, and must appear to be within the jurisdiction of the justice.² And where the premises were described as "a certain house and lot situated in a particular village," naming the village, the description was held to be altogether too general to meet the requirements of the statute; and the fact that the magistrate, in issuing the summons, had given a more specific description than that contained in the affidavit, could not aid the landlord, nor of itself confer jurisdiction.³ The affidavit may be sworn to before any person authorized to administer oaths,—except that where the proceedings are taken before one of the district courts in the city of New York, it must be sworn before the clerk of the court or his deputy.⁴ Where proceedings have once been had, the original affidavit cannot be used as the foundation of a new proceeding under this act; and in a case where it was so used, and the tenant turned out of possession, it was held that the proceedings were *coram non judice* and void, and that trespass lay against both landlord and judge.⁵

§ 721 b. Summons to be Issued.—On receiving the affidavit, the officer will issue his summons, describing the premises of which possession is claimed, and requiring any person who is in possession, or who claims the possession thereof, forthwith to remove therefrom, or to show cause

¹ *Prouty v. Prouty*, 5 How. Pr. R. 81; *Simpson v. Rhinelander*, 20 Wend. 103; *Jackson v. Adams*, 1 Wils. (Ind.) 398.

² *People v. Platt*, 43 Barb. 116.

³ *Campbell v. Mallory*, 22 How. Pr. R. 183.

⁴ *People v. Alden*, 26 How. Pr. R. 166.

⁵ *McCoy v. Hyde, supra*. In a case of a tenancy from month to month, the landlord gave notice to quit on the 4th of May, but afterwards received rent to 1st of June following, and on 17th June commenced proceedings, without stating, in his affidavit, that, at the time he received the rent, he reserved his rights under this notice to quit; it was held that his acceptance of rent was a waiver of the notice, and that his proceeding was consequently erroneous. *Prindle v. Anderson*, 19 Wend. 391.

before him, within such time as shall appear reasonable,—not less than three nor more than five days,—why possession of the said premises should not be delivered to such applicant. If it be a case, however, of continuing in possession after the expiration of the term, without permission of the landlord, the magistrate, if the summons be issued on the day the term expires, or on the next day thereafter, may direct the summons to be made returnable the same day, at any time after twelve o'clock noon, and before six o'clock in the afternoon.¹ The summons should be directed to all the persons intended to be removed, by name, occupants as well as tenants. And where a summons was directed to W. (the original tenant), or any other person claiming possession of the premises, and, after reciting the affidavit, proceeded thus: "Therefore, in the name of the people, you, and those claiming under you, are hereby summoned," &c.; and the constable who served the summons made affidavit of service by giving personal notice of it to W., also by leaving a copy with H., who claims possession of a portion of the premises; and it appeared that H. was in possession of a part of the premises of which W. was not,—the proceedings were held to be void for want of jurisdiction.²

§ 722. Service of Summons.—The summons must be served either: 1. By delivering to the tenant to whom it shall be directed a true copy thereof, and at the same time showing him the original; or, 2. If such tenant be absent from his place of residence, and such place is in the city or town in which the demised premises are situated, by leaving a copy

¹ Session Laws, 1851, c. 460, as amended by laws of 1868, p. 1930. *Duel v. Rust, supra.* In Pennsylvania the act of March 23, 1865, repealed the provision of the act of Dec. 14, 1863, that a warrant should be issued forthwith. *Connelly v. Arundel*, 6 Phila. 38.

² *Hill v. Stocking*, 6 Hill, 317; *Cunningham v. Goelet*, 4 Den. 71. But where a proceeding was against two persons, both of whom were named in the affidavit, and the summons was directed to one of them, and *any other person in possession of the premises*, and both appeared before the officer, made affidavits, and had a trial by jury, without objecting to the summons,—it was held to be sufficient. *Sims v. Humphrey*, 4 Den. 185; *id. 71.*

thereof at such place with some person of mature age residing on the premises ; or, 3. If no such person can be found at that place, or if the place is not in the same city or town as the demised premises, and the tenant cannot be found upon said premises, by leaving a copy thereof at said premises, with some person of mature age residing thereon ; or, if there be no such person residing thereon, with some person of mature age connected with the demised premises by employment in any business for which such premises are used ; or if no person residing or employed on the demised premises can be found thereon, then such service may be made by affixing the copy upon a conspicuous part of said premises. If the summons be returnable on the day on which it is issued, it shall be served at least two hours before the hour at which it is made returnable, and if not returnable on the same day, it shall be served at least two days before the day on which it is made returnable. The proof of the service of the summons forms part of the record of the proceeding, and must state particularly the exact time, place, and manner of service, including the name of the person on whom the service was made, if it can be ascertained.¹

§ 722 a. Service on Under-Tenant.— Where there are under-tenants upon the premises, each one of them must be served with a copy of the summons, in order that he may have an

¹ Laws of 1857, vol. ii. p. 509, amended by laws of 1868, p. 1930. “It shall be the duty of every person to whom a copy of a summons shall be delivered in pursuance of subdivision two or three of section thirty-two of title ten, chapter eight, part three, of the Revised Statutes, to deliver such copy to the tenant to whom the same is directed, or, if such tenant cannot be found, to his agent for the demised premises, without any avoidable delay; and a copy of this section shall be written or printed upon the outside of every such copy. If neither the tenant nor his agent can be found for that purpose, then the person to whom such copy is delivered shall take the same to the magistrate by whom the summons is issued, at the time and place named therein, and inform him that the tenant cannot be found. Every person who shall wilfully violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not less than thirty days nor more than one year.” Laws, 1868, p. 1930. Service even on an alleged agent of lessee is sufficient. *Waters v. Ford*, 64 Pa. St. 336.

opportunity of defending his possession; and no warrant can issue to dispossess such as have not been served. It is not necessary to serve a copy of the affidavit on which the summons is founded.¹ If, at the time appointed in the summons, no sufficient cause be shown to the contrary, and due proof of the service of the summons be made to such magistrate, he will thereupon issue his warrant to the sheriff of the county, or to any constable or marshal of the city or town where the premises are situated, commanding him to remove all persons from the said premises, and to put the applicant in possession thereof.² There is no sufficient proof of the service of the summons, without showing personal service on the tenant, or that he was absent from his last or usual place of residence; and in this case, that the copy was left there with a person of mature age, during such absence.³

§ 723. Tenant's Right to.—How conducted.—If the tenant is disposed to contest the landlord's proceedings upon the return of the summons, and denies his right to take possession in this summary manner, the statute reserves to him the privilege of having his case tried, either by a jury, or by the magistrate, as he may elect. For this purpose, the statute authorizes any person in possession of the demised premises, or claiming the possession thereof, at the time appointed in the summons for showing cause, to file an affidavit with the magistrate who issued it, denying the facts upon which the summons was issued, or any of those facts; and the matters thus controverted may be tried by the magistrate,—or by a jury, if either party to the proceeding shall, at the time appointed in the summons for showing cause (and before adjourn-

¹ Sims *v.* Humphrey, *supra*; *Ex parte* Glenn, 1 How. Pr. R. 213. If the under-tenant is removed by proceedings to which he has not been made a party, the landlord is liable to him as a trespasser. Croft *v.* King, 8 Daly, 265.

² *Id.* 514, §§ 32, 33.

³ Cameron *v.* McDonald, 1 Hill, 512. Upon the receipt of such summons, the defendant, if he holds under any other person than the plaintiff mentioned in the summons, must forthwith give notice of the service upon him, to his immediate landlord, under a penalty of forfeiting the value of three years' rent of the premises occupied by him. 1 R. S. 748, § 27.

ment) demand a jury, and shall at the time of the demand pay the necessary costs and expenses of obtaining a jury.¹ The denial in the defendant's affidavit to put the landlord upon the proof of his case must be express and positive, not circumstantial nor argumentative.² But it is sufficient if it denies, generally, each and every allegation contained in the landlord's affidavit.³ In order to form a jury, the magistrate with whom the affidavit is filed must nominate twelve reputable persons, qualified as jurors in courts of record, and issue his precept directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the person so nominated to appear before the magistrate, at such time and place as he shall therein appoint, not more than three days from date, for the purpose of trying such matters.⁴ It is erroneous to summon any other than the exact number of jurors directed by the statute, for summary proceedings are open to all technical objections.⁵ If a sufficient number of jurors do not appear, or cannot be obtained, to form a jury, the magistrate may order

¹ 2 R. S. 514, § 34, as amended by laws of 1849, c. 193, § 2, and laws of 1857. The act of Dec. 14, 1863, which abolished the right to a jury, is constitutional, as the jury was not properly such, but an inquest only. *Kinley v. McFillen*, 6 Phila. 35. An affidavit of the tenant, stating that the landlord had previously, by a similar proceeding, impleaded the tenants before a magistrate, on account of the non-payment of the same rent, and that the parties appeared, and after their proofs and allegations were heard, the magistrate gave judgment in favor of the tenants, is not sufficient to bar the landlord's claim, as it does not show what issue, or whether any, was joined, or upon what ground the judgment proceeded. *Geisler v. Acosta*, 9 N. Y. 227. Whether a defence in such proceedings can be interposed by plea, — *quare*. Where two tenants are jointly charged, in the affidavit of the landlord, with holding over after demand and non-payment of rent, the affidavit of one of them that the rent had not been demanded of *him* is not sufficient to make an issue requiring the summoning of a jury. A demand of the rent of one tenant, where two hold jointly, is sufficient to authorize the proceedings. *Id.*

² *Niblo v. Post*, 25 Wend. 284.

³ *People v. Coles*, 42 Barb. 96.

⁴ 2 R. S. 514, § 35.

⁵ *Farrington v. Morgan*, 20 Wend. 207. This decision was made under the statute of 1830, which required eighteen jurors to be summoned, instead of twelve.

any sheriff, constable, or marshal to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors as shall be sufficient, and return their names to the magistrate; and the persons so returned may be compelled to attend.¹ Six of the persons summoned shall be balloted for and drawn in like manner as jurors in justices' courts; and shall be sworn by the magistrate well and truly to hear, try, and determine the matters in difference between the parties. A tenant proceeded against under this statute, may, upon the trial, disprove any material fact controverted by him, but he cannot set up a title to the premises, which he has acquired since the taking of his lease, in bar of the landlord's claim to be put in possession.² Nor where the proceeding is under the last clause of the statute, can he inquire into the regularity or validity of the judgment on which the execution was issued.³ But he may show that the landlord's title has been extinguished or terminated in some way by a conveyance, or by operation of law.⁴

§ 724. Trial. — Matters of Proof. — Witnesses. — The plaintiff's affidavit is not to be regarded as evidence upon a trial on the merits, but when controverted by the tenant's affidavit,

¹ Laws N. Y. of 1862, c. 368, p. 621; *Roach v. Cosine, supra*. The landlord has no right of peremptory challenge. *People v. Hamilton*, 39 N. Y. 107.

² *Rowan v. Lytle*, 11 Wend. 616; *McGarvey v. Pickett*, 27 Ohio St. 669. An interruption of the enjoyment of a privilege conferred by a lease, by physical means adopted by the landlord, constitutes an eviction, and suspends not only the rent, but also the landlord's remedies for the recovery of possession; and where a mill, with a railroad leading to it, were included in a lease, and the lessor, after the tenant had taken possession, tore up the rails, the court held it to be an eviction of the tenant, which barred his action for the recovery of possession on the ground of non-payment of rent. *Peck v. Hiler*, 24 Barb. 178. And it did not alter this case that the defendant had recovered damages of the lessor for a breach of the covenant for the use of the railroad, the covenant being a continuing covenant.

³ *Brown v. Betts*, 13 Wend. 29.

⁴ *Nellis v. Lathrop*, 22 Wend. 121; *Buck v. Binninger, supra*; *Rowan v. Lytle, supra*; and that he now holds under a lease from the real owner: *Supp v. Keusing*, 5 Rob. (N. Y.) 609; *ante*, § 708.

stands as a pleading, and is to be proved.¹ A copy of the notice to quit is good evidence, if notice to produce the original has been given to the other party.² It is no defence that the landlord has violated his agreement with the lessee; the latter must either restore the possession or pay the rent.³ If there be a default of jurors on the return of a *venire*, or if some of them are disqualified, the justice is authorized to issue a second *venire*, until a jury appears and is qualified. After hearing the proofs and allegations of the parties, the jurors are to be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who must be sworn to keep the jury as is usual in like cases in courts of record. If the jury cannot agree after being kept together for such time as the magistrate shall deem reasonable, he may discharge them, and nominate a new jury, and issue a new precept.⁴ Any magistrate before whom the application shall be pending, may, upon the request of either party, *adjourn the hearing*, for the purpose of enabling him to procure his witnesses, whenever it shall appear to be necessary; but the adjournment shall in no case exceed ten days. He may also, at the request of either party, issue his subpoena, requiring any person to appear and testify before him, or before the jury, touching the matters directed to be heard by them; and every person who, being served with such subpoena, shall, without reasonable cause, refuse or neglect to appear, or, appearing, shall refuse to answer upon oath touching the matters aforesaid, shall be subject to the proceedings and penalties provided by law in similar cases. But if the magistrate

¹ Simpson *v.* Rhinelander, *supra*. The parties can be examined as witnesses on their own behalf in this proceeding under the provisions of the New York Code, § 399, &c. Laws of 1860, p. 787; and of 1865, p. 1290; People *v.* Simpson, 23 How. 481. See also Code, § 471; Benjamin *v.* Benjamin, 5 N. Y. 383; Capet *v.* Parker, 3 Sandf. 665; People *v.* Willis, 5 Abb. Pr. R. 242.

² Eizenhart *v.* Slaymaker, 14 S. & R. 153.

³ People *v.* Kelsey, 38 Barb. 269; Paine *v.* Trin. Ch. 14 N. Y. 89.

⁴ Roach *v.* Cosine, 9 Wend. 230; Porter *v.* People, 7 How. Pr. R. 441. After the evidence is closed, it is proper for the magistrate to charge the jury upon the law of the case. People *v.* Kelsey, 38 Barb. 269.

refuses to adjourn, it seems the Supreme Court will not take notice of such refusal, on *certiorari*.¹ And if he exceeds his authority by granting an adjournment which the statute has not provided for, he is precluded from a further hearing or exercise of jurisdiction in the case, and all subsequent acts and proceedings therein are void.² After the litigation has terminated, and the officer has received the warrant authorizing him to put the landlord in possession of the premises, he will proceed to execute the same,— the statute directing the officer to whom such warrant for delivering possession shall be directed and delivered, in either of the cases aforesaid, to execute the same according to the tenor thereof. If the decision of the magistrate, or the verdict of the jury so summoned, shall be in favor of the lessor or landlord, or other person claiming the possession of the premises, the magistrate shall issue his warrant to the sheriff of the county, or to any marshal or constable of the county in which the premises are situated, commanding him to put the landlord, lessor, or other person into possession of the premises.³

¹ *Wilson v. Green*, 20 Wend. 180. The plaintiff in a landlord-and-tenant proceeding cannot, after producing a written lease, the execution of which he fails to prove, maintain his action on parol proof of possession and payment of rent. *Barry v. Ryan*, 4 Gray, 523. In case of proceedings before a justice of the peace, he must enter the finding of the jury, or, in case no jury is called, his final decision, upon the application for the warrant, in his docket, and render judgment therefor; and include in the judgment costs to the prosecuting party at the same rate of fees allowed in justices' courts, and limited in like manner. And in the warrant for delivery of possession or by execution, he must direct the collection of such costs. *Laws*, 1849, p. 292.

² *Bolles v. Mayor*, 40 N. Y. Sup'r. 523.

³ 2 R. S. 514, §§ 36-39. Rainy weather is no excuse for the delay of the officer in the execution of this writ. *Higginbotham v. Lowenbein*, 28 How. Pr. R. 221. If the magistrate refuses to issue the warrant after he has been required to do so, he will be compelled to issue it by *mandamus*. *People v. Willis*, 5 Abb. Pr. R. 206. Under a writ of possession, the officer must invest the plaintiff with complete possession in which the latter will be so established that any person entering on him, *se invito*, will be indictable for a forcible entry. The officer is not bound to remove the tenant's goods, but he may give tenant an opportunity to do so, or remove them himself as the plaintiff's agent. *Township of Union v. Bayliss*, 11 Vroom, 60.

§ 725. Warrant to remove Tenant.—Effect of. — The issuing of the warrant for the removal of the tenant operates as a dissolution of the relation of landlord and tenant. The statute declares, “ whenever a warrant shall be issued as aforesaid by any such magistrate, for the removal of any tenant from any demised premises, the contract or agreement for the use of the premises, if any such exists, and the relation of landlord and tenant between the parties shall be deemed to be cancelled and annulled.”¹ This section, however, is not intended to prevent a landlord from collecting all rent due from the tenant for the non-payment of which he was dispossessed, as well as that which accrues subsequently for actual occupation ; its operation being, not to annul the lease from its date, but only from the time of the default for which the warrant issued. Compensation for the use of the premises by the tenant, intermediate the default and the time he is dispossessed, cannot, however, be recovered by an action on the lease ; but the landlord’s only remedy for this is by an action of trespass, in which he recovers a sum proportionate to the rent, as damages for the wrongful detention.²

§ 726. Stay of Proceedings. — In either of the cases contemplated by the statute, except where the tenant holds over after the expiration of his term, provision is made for a stay of all proceedings against the tenant, upon his complying with the requisition of the law adapted to his particular case. And the proceedings will be stayed in any stage of the cause upon the terms mentioned in the statute. The issuing of the warrant of removal will be stayed in the case of a proceeding for the non-payment of rent, if the person owing the rent shall, before such warrant be actually issued, pay the rent due, and all the costs and charges of the proceedings, or give

¹ 2 R. S. 515, §§ 41-43.

² *Hinsdale v. White*, 6 Hill, 507; *Rubicum v. Williams*, 1 Ashm. 235; *Hartshorne v. Watson*, 4 Bing. N. C. 178; *McKeon v. Whitney*, 3 Den. 452; *Crane v. Hardman*, 4 E. D. Smith, 339, 448; *Whitney v. Myers*, 1 Duer, 266; *Giles v. Comstock*, 4 N. Y. 270. But this is otherwise in Massachusetts by statute: Pub. Stat. c. 175, § 6; and in Indiana: *White v. Stellwagen*, 54 Ind. 186; and intermediate rent, &c., may be recovered.

such security as shall be satisfactory to the said magistrate, to the person entitled to such rent, for the payment thereof, and the costs aforesaid, in ten days. And in case the person giving such security shall not, within the said ten days, produce to the magistrate satisfactory evidence of the payment of the rent and costs, the warrant of removal may at any time thereafter be issued. When the application to a magistrate is founded on the fact that the tenant or lessee has taken the benefit of any insolvent act, or been discharged under any act for the relief of his person from imprisonment, the proceedings will be stayed, if at any time before issuing the warrant for removal, the tenant or lessee, or his assignee, shall pay the costs of such proceedings as have been had, and give such security to the person entitled to the rent, for the payment thereof as it shall become due, as shall be satisfactory to the magistrate. When the application is founded on an alleged sale by execution, of the premises occupied by the defendant in such execution, the proceedings will be stayed, if at any time before issuing the warrant of removal, the occupant shall, 1. Pay the costs of such proceedings; 2. File with the officer before whom the application is pending an affidavit that he claims the possession of such premises by virtue of some title or right acquired after such premises were sold, or as guardian or trustee for any other; and, 3. Execute a bond to the applicant for such warrant, in such penalty, and with such securities, as the magistrate shall approve, conditioned to pay the costs which may be recovered against him in any ejectment that may be brought by such applicant within six months, for the recovery of the possession of such premises; and to pay the value of the use and occupation of such premises, from the date of such bond, to the time such applicant shall obtain possession of the same by virtue of a recovery in such action of ejectment; and also conditioned not to commit any waste or injury to such premises during his occupation thereof.

§ 727. Payment or Tender by Tenant.—Effect of.—The statute has further guarded the rights of both parties, by providing that nothing therein contained shall be construed to

impair the rights of any landlord or lessor, or of any tenant, in any case not therein provided for.¹ By the law of 12th April, 1842, also, in proceedings under the second subdivision of the 28th section of the above statute, if the unexpired term of the lease exceeds five years at the time of issuing the warrant, the lessee, his assigns, or personal representatives, may, at any time, within one year after possession of the demised premises shall have been delivered to the landlord, pay, or tender to the lessor, his representatives, or attorney, or to the officer who issued the warrant, all rent in arrear to the time of payment or tender, and all costs incurred ; and in such case the premises shall be restored to the lessee, who shall hold and enjoy the same without any new lease thereof, according to the terms of the original demise ; and any mortgagee of the lessee, or any part thereof, who shall not be in possession of the premises, or any judgment creditor of the lessee, who shall, within a year after the execution of the warrant, pay all rent in arrear, all costs and charges as aforesaid, and perform all the agreements of the first lessee, shall not be affected by such recovery ; and such judgment creditor may file a suggestion of such payment upon the record, and issue execution for the amount of the original judgment and of such payment.

§ 728. Certiorari.—Effect of, and Proceedings upon.—The Supreme Court may award a *certiorari* for the purpose of examining any adjudication made on any application authorized by the statute ; but the proceedings cannot be stayed or suspended by such writ of *certiorari*, or by any other writ or order of any court or officer so far as to prevent the issuing of a warrant of possession.² Even a court of equity has no power to stay these proceedings for such a purpose ; for if a

¹ 2 R. S. §§ 48–51.

² 2 N. Y. R. S. 515, §§ 44–47; *Lynde v. Noble*, 20 Johns. 80; *Launitz v. Dixon*, 5 Sandf. 249. No one but a party interested in the subject-matter of the proceedings can have this writ. *Colden v. Betts*, 12 Wend. 234. *Certiorari* also lies in Pennsylvania and Michigan. *Brown's App.*, 66 Pa. St. 165; *Smith v. Reed*, 24 Mich. 240; *Farrell v. Taylor*, 12 *id.* 113; Mich. Stat. 1869, p. 10; and probably in most of the States, as these proceedings are not according to the course of the common law.

tenant sustains injury or damage by being wrongfully dispossessed, he has an adequate remedy by a writ of restitution from the Supreme Court, or by an action upon the covenant for quiet enjoyment contained in the lease.¹ In the return to the *certiorari*, it must affirmatively appear that the statute has been strictly pursued in the proceeding before the magistrate; as that the officer to whom the precept for that purpose was directed was commanded to summon eighteen reputable persons qualified to serve as jurors in courts of record, who had been nominated by the magistrate before whom the proceedings were had, or the proceedings will be quashed. And it is not enough if the return states that the officer was commanded to summon a jury *as directed by the statute*.² Upon such *certiorari*, the Supreme Court have power to examine into the correctness of all the decisions of the officer before whom the proceedings were had, upon questions of law, and to require the return of such parts of the proceedings as are material to an examination of the case upon its merits. The authority of the court, in such case, is not limited to questions of jurisdiction and regularity, but it may affirm, reverse, or quash the proceeding, as justice may require. It will not, however, reverse the judgment as to some of the defendants,

¹ *Smith v. Moffat*, 1 Barb. 65. *Roach v. Cosine*, 9 Wend. 228; *Wordsworth v. Lyon*, 5 How. Pr. R. 463; *Hyatt v. Burr*, 8 *id.* 168; *Sherman v. Wright*, 50 N. Y. 227; *Worthy v. Tate*, 44 Ga. 152. This prohibition of the statute against injunctions only affects cases where the magistrate has jurisdiction, and not those where, by the admission of the person assuming to be landlord, he has no jurisdiction. Per Mason, J., in *James v. Stuyvesant*, 3 Sandf. 665; *Sherman v. Wright*, *Worthy v. Tate*, *supra*. Nor would the statute prevent a court of equity from relieving a tenant from fraud or surprise. *Id.*; *Forrester v. Wilson*, 1 Duer, 624. Nor where he is prevented by means beyond his control from attending before the justice, and setting up his defence. *Bokee v. Hamersly*, 6 Duer, 624; *Duigan v. Hogan*, 1 Bosw. 645. The *certiorari*, however, suspends the effect of the judgment of the magistrate in everything except what remains to be done by himself; and although he may issue his warrant to dispossess the tenant during the pendency of the *certiorari*, his judgment is no evidence that the tenancy has ceased, or of the landlord's right to re-enter; nor can the landlord maintain an action for rent accruing between the time of the forfeiture and the issuing of the warrant. *Launitz v. Dixon*, 5 Sandf., *supra*.

² *Farrington v. Morgan*, 20 Wend. 207.

and affirm it as to the others ; for if irregular as to one, it is irregular as to all.¹ Whenever any such proceedings brought before the Supreme Court by *certiorari* shall be reversed or quashed, the court may award restitution to the party injured, with costs, and may make such orders and rules, and issue such process, as may be necessary to carry their judgment into effect;² and that notwithstanding the lease may have contained a covenant that in case of failure to pay the rent the estate of the tenant shall cease.³ In all cases of an application pursuant to the provisions of this article, the prevailing party will recover costs, and may maintain an action for the recovery thereof, and if the proceedings shall be reversed or quashed by the Supreme Court, the tenant or lessee may recover against the person making application for such removal any damages he may have sustained by reason of such proceeding, with costs, in an action on the case.⁴ The judgment of the Supreme Court, at a general term upon the *certiorari*, will be final, unless an appeal shall be allowed by the said court, at a general term, before the end of the term next after that at which the judgment was rendered. The appeal upon any judgment rendered upon such *certiorari*, may be brought on for argument, as a preferred cause, at any term of the Court of Appeals, by either party, upon fourteen days' notice.⁵ Upon a reversal of the judgment, if the lessee has been dispossessed, he is entitled to recover his damages, without regard to the ground of reversal.⁶

¹ *Anderson v. Prindle*, 23 Wend. 616; *Buck v. Binninger*, 3 Barb. 391; *Niblo v. Post*, 25 Wend. 280; *Benjamin v. Benjamin*, 5 N. Y. 383; *Morewood v. Hollister*, 6 *id.* 309; *Geisler v. Acosta*, 9 *id.* 227; *Haviland v. White*, 7 How. Pr. R. 154.

² The court will not, of course, award restitution to the tenant if the term has expired before judgment of reversal is rendered. *Chretien v. Doney*, 1 N. Y. 420.

³ *Walcott v. Schenck*, 16 How. Pr. R. 449.

⁴ 2 R. S. 516, §§ 48, 49.

⁵ *Laws*, 1868, p. 1931.

⁶ *Hayden v. Florence Sew. M. Co.*, 54 N. Y. 221. And in such a case, there being no judgment, the rule of tenant's estoppel prevails and protects the landlord from the effect of an attornment made, pending the appeal, to one who obtained judgment below. *Ross v. Kernan*, 31 Hun, 164.

§ 728 *a. Appeal from Magistrate.* — The proceedings before a justice of the peace may also be removed after judgment, by appeal to the county court in the same manner and with the like effect, and upon the like security as appeals from the judgments of justices in civil actions; except that the decision of the county judge must be an affirmance or reversal of the judgment, and is final. But in addition to the security for the judgment required in case of an appeal, in order to stay the issuing of a warrant or execution, there must also, in case the tenant appeals, be security given to pay all rent accruing or to accrue upon the premises subsequent to the application to the justice. Nor will the appeal be allowed, unless security for the judgment be given and approved by the judge, at the time of allowing the appeal, and notice also be served on the justice with the affidavit for appeal.¹

¹ Laws, 1849, c. 193, § 5. The practice upon these appeals is now regulated in New York by the Code of Procedure, §§ 353–356, &c., and is substantially the same as appeals in actions. 19 Abb. Pr. R. 233. In Michigan it is held that the landlord's right to damages and costs in summary process is not affected, although pending the tenant's appeal the term expires and the landlord regains possession. Peters v. Fisher, 50 Mich. 331.

We have stated, *ante*, § 717, note, that the summary proceeding for landlords to recover possession, although in many States included with the statutory enactments upon forcible entry and detainer, and though a like remedy is given in either case, are yet generally kept distinct, either by the express language of the statutes, or by judicial construction, even in cases where the words of the statute would seem clearly to include and apply to both processes. The proceeding given in the text is therefore substantially the same with the summary proceedings for possession by landlords in other States, however these may be entitled. They are so largely governed by statute, and yet so generally alike in detail, that only the leading features of the enactments concerning them need be given, with a few decisions illustrating doubtful or varying points.

§ 1. There seem to be six classes of cases in which landlords are entitled to take summary proceedings. *First*, where the tenant holds over beyond a definite term; *secondly*, where a tenant at will holds after notice to quit; *thirdly*, where rent has not been paid, or where there has been a disclaimer of the landlord's title, though these acts are not made grounds of forfeiture in the lease; *fourthly*, where the premises are used for some illegal or immoral purpose; *fifthly*, where the lease is determined by forfeiture, for breach of its provisions; and, *sixthly*, where the tenant has abandoned the premises without leaving sufficient goods therein.

§ 2. The first of these grounds exists in *Maine*: Gen. Stat. 1857, c. 94; *Massachusetts*: Pub. Stat. 1882, c. 175; *Ohio*: Rev. Stat. 1854, c. 54, §§ 125, &c.; *Indiana*: 2 Gavin & H. Stat. pp. 630, &c.; *Illinois*: Stat. 1857, vol. i, p. 521; *Kentucky*: Code, §§ 500, &c.; *Michigan*: Comp. Laws, 1857, §§ 4985, &c.; *Iowa*: Code, §§ 2362, &c.; *Missouri*: Rev. Code, 1855, pp. 787, &c.; *California*: Comp. Laws, 1853, c. 36; *New Hampshire*: Gen. Stat. 1867, c. 231; *Vermont*: Gen. Stat. 1862, c. 46; *Connecticut*: Gen. Laws, 1866, tit. I. §§ 350, &c.; *New Jersey*: Nixon's Dig. 1861, pp. 322, 454; *Pennsylvania*: Purdon's Dig. 1861, p. 613; *Wisconsin*: Rev. Stat. 1858, c. 155; *Georgia*: Rev. Code, 1868, §§ 4005, &c.; and *Alabama*: Rev. Code, 1867, §§ 3297, &c., though in the last eight of these States process lies only after demand and notice. This in New Hampshire is seven, and in Connecticut thirty days; in Pennsylvania, three months; in Wisconsin, three days; while in Vermont, New Jersey, Georgia, and Alabama, no time is specified.

§ 3. The remedy is given in the second class of cases in all the above-mentioned States, except, perhaps, California, Ohio, Connecticut, and Vermont. See statutes cited *supra*. In Michigan, Wisconsin, and New Jersey, as in New York, the process is given against tenant at sufferance only after notice. Statutes, *ubi supra*. But in most of the States a tenant at sufferance is liable to the process at once and without notice. See *ante*, § 718, and note.

§ 4. The remedy in the third class of cases, for non-payment of rent, is given in New Jersey, California, and Wisconsin, after three days' notice and demand in writing; in New Hampshire, after seven; in Indiana and Illinois, ten, though only after a demand in the latter State, by the act of 1865: *Cone v. Woodward*, 65 Ill. 477; *Woodward v. Cone*, 73 *id.* 241. And against a sub-tenant also. *Patchell v. Johnston*, 64 *id.* 305. In Michigan and Massachusetts fourteen days' notice is required, but in the latter State prior demand is not required, and the process lies irrespective of the debts of the landlord to the tenant. *Borden v. Sackett*, 113 Mass. 214. In Pennsylvania fifteen days' notice is required, while in Georgia no time is prescribed. Statutes, *ubi supra*. The process also lies in Missouri for attornment to a stranger, after ten days' notice: *McCartney v. Auer*, 50 Mo. 395. See *Green v. Sternberg*, 15 Mo. App. 32.

§ 5. In Massachusetts and Ohio, formerly in New York, and probably in other States, if the premises are used for an illegal or immoral purpose, prohibited criminally by statute, the landlord may dispossess the tenant of them summarily. Mass. Pub. Stat. 1882, c. 101, § 8; *Prescott v. Kyle*, 103 Mass. 381; *Justice v. Lowe*, 26 Ohio St. 370; *McGarvey v. Pickett*, 27 *id.* 669; *ante*, § 521. See N. Y. Laws, 1868, p. 1424; 1873, c. 583; and Laws of 1880, c. 245; § 521, *ante*, *et cit.* The sole remedy in that State is now by ejectment, and this under Code, 2231, cannot be maintained when the illegal user has ceased before proceedings are instituted. *Shaw v. McCarty*, 11 Daly, 150.

§ 6. The fifth ground for this process is given in Maine, New Hampshire, and Vermont, and also in Massachusetts and Connecticut, though

not formerly recognized in the two latter States (see *Fifty Assoc. v. Howland*, 11 Met. 99; *Du Bouchet v. Wheaton*, 12 Conn. 533). But now, see *Mass. Pub. Stat. c. 175, § 1*; *Conn. Gen. Stat. 1866, § 350*; *Barnum v. Keeler*, 33 Conn. 209. But the lease, if voidable, must first be avoided by entry. *Bowman v. Foot*, 29 Conn. 331; *Lang v. Young*, 34 *id.* 526. In California, Nevada, Michigan, Wisconsin, and Illinois, it is broadly enacted that the process shall lie upon the breach of any covenant or condition of the lease and a demand for possession. Statutes, *ubi supra*. So apparently in Alabama, where it lies on the "termination of the tenant's possessory interest."

§ 7. *Sixthly*, in Pennsylvania and some other jurisdictions, if the tenant abandons the premises without leaving sufficient goods for security, the landlord has this process. *Act of March 25, 1825*; *Grider v. McIntyre*, 6 *Phila.* 112.

§ 8. In the States first above mentioned, except Vermont, New Hampshire, and Massachusetts, the proceeding is begun, as in New York, by a complaint, which in California, Georgia, Michigan, Illinois, New Jersey, and Maine, must be sworn to. In Connecticut, process issues only if the complainant first gives bond for costs. In the other three New England States first named, the process is begun by a writ, like any other civil action. The complaint serves the office of a declaration, being made part of the record. *Caswell v. Ward*, 2 *Doug. (Mich.)* 374. It must, therefore, as this proceeding is not according to the course of the common law, set forth all the facts which constitute the offence, and give the court jurisdiction. *Bush v. Dunham*, 4 *Mich.* 339; *Royce v. Bradburn*, 2 *Doug. (Mich.)* 377; *Bryan v. Smith*, 10 *Mich.* 229; *Ish v. Chilton*, 26 *Mo.* 256; *Shaw v. Gordon*, 2 *Greene (Iowa)*, 376; *Rains v. Oshkosh*, 14 *Wisc.* 372; *Dunne v. Trustees*, 39 *Ill.* 578; *Uber v. Hickson*, 8 *Phila.* 132; *Erety v. Wiltbank*, *id.* 300; *McGinniss v. Vernam*, 67 *Pa. St.* 149; *McGrath v. Donnelly*, 7 *Phila.* 43. Thus, besides a description of the premises and the relation of landlord and tenant between the parties, the time of the offence and complainant's right to the possession must properly appear. In Vermont, New Hampshire, Massachusetts, and Michigan, however, by express provision of the statute, and perhaps in some other States by construction, the complaint or declaration need only describe the premises and aver that the defendant holds them unlawfully, and against the right of the plaintiff, and no further declaration is necessary. See the Statutes of the several States as cited in § 2, *supra*.

§ 9. In all these States justices of the peace for the State or county have jurisdiction of this proceeding, except in Michigan, where a commissioner or judge of the Circuit Court may entertain it originally; and on complaint or writ a summons issues to the defendant to appear at an early day named to try the issue of the right to possession. Statutes *supra*, and *post*, § 10, and cases cited. The provisions for service and return provided for by the statutes of the several States so closely resemble those of New York, already given in the text, that they do not need special mention here. In Georgia, however, no trial is contemplated to be had

in the court of first resort. On a sworn complaint being made, a warrant issues for the removal of the tenant, who may, however, make a counter affidavit traversing the complainant's, and give a bond to the sheriff to contest the issues raised. Whereupon the cause is, as of course, removed to the higher court. The issue seems to be tried, as of course, before the justice with a jury, only in Vermont, Kentucky, and Illinois; while in the other States, except in Alabama, where no jury seems to be allowed, a jury trial is had if either party so desire, though in Connecticut a jury trial is had only on the complainant's giving bond. For the details of the trial and matters of evidence and practice thereon, the reader is again referred to the statutes of the several States as above cited.

§ 10. It is very generally provided by statute that the title to real estate shall not be tried before a justice of the peace; and in view of the summary character of the proceedings and of the speedy relief intended to be given thereby, it is also specifically enacted in some States, as in Alabama, Iowa, and New Jersey, that the title shall not be inquired into in this process. Statutes, *ubi supra*. Unless when otherwise directed by statute, this would seem to follow from the general estoppel of a tenant to deny his landlord's title. *Settle v. Henson*, Morris, 111. But this rule is also subject to exceptions, as that a tenant may show that the lessor's title is determined (*ante*, § 708, and see *infra*). The statutory enactments may prescribe a stricter rule in some States, and preclude the tenant even from these inquiries if the relation of landlord and tenant is once shown to exist. *Townsend v. Van Aspen*, 38 Ala. 572; *Jarvis v. Hamilton*, 16 Wisc. 574; *White v. Bailey*, 14 Conn. 271, where the tenant was not allowed to show that the lessor's title had expired, although by statute in the same State he might set up a title acquired by himself since the demise. *Rodgers v. Palmer*, 33 *id.* 135. In some States, the justice is ousted of his jurisdiction merely by the affidavit or plea of the tenant asserting title. Thus in Maine, the tenant may file a brief statement of title in himself or some other under whom he claims, and the cause shall thereupon be removed and tried on this issue in the higher court, upon his giving bond to pay costs and intervening rent. So in Pennsylvania, under the acts of 1772 and 1863: *Haffner v. Hoeckley*, 3 Brewst. 253; and even the affidavit of a third person would remove the cause. *Daly v. Barrett*, 4 Phila. 350. But it is otherwise on both these points in proceedings under the acts of 1825, 1830, and 1865. *Essler v. McConachy*, 25 Pa. St. 350; *Clark v. Everly*, 8 W. & S. 226; *Bergman v. Roberts*, 61 Pa. St. 497. Again, in New Hampshire and Iowa it is provided that the justice cannot entertain the cause if the title comes in issue by *plea*; and in Massachusetts, if by *plea or otherwise*. While, however, the general rule that the tenant is estopped to deny the landlord's title will, except where he is relieved by statute, preclude any mere assertion of title in himself or in another, in this process (*Oakes v. Munroe*, 8 Cush. 282; *Hogan v. Harley*, 8 Allen, 525; *Ball v. Chadwick*, 46 Ill. 28; *Lay v. Eisleben*, 50 Mo. 122; *Heyer v. Beatty*, 76 N. C. 28), those issues as to the title which constitute exceptions to the estoppel seem clearly considered to be within

the justices' jurisdiction. *Silvey v. Sumner*, 61 Mo. 253. Thus, it may be shown that the tenant has been evicted: *Hawes v. Shaw*, 100 Mass. 187; or has attorned to the paramount title: *Miller v. Lang*, 99 *id.* 13; *Rodgers v. Palmer*, 33 Conn. 155; or that the assignment to the plaintiff transferred no title: *Grundin v. Carter*, 99 Mass. 15; *Hilbourn v. Fogg*, *id.* 11; *Bergman v. Roberts*, 61 Pa. St. 497; or that the lessor's title has determined: *De Coursey v. Guar. Tr. Co.*, 81 Pa. St. 217; *Newell v. Gibbs*, 1 W. & S. 490; *Heyer v. Beatty*, *supra*; *Hilbourn v. Fogg*, *supra*; or that the tenant has a valid equity: *Turner v. Lowe*, 66 N. C. 413; or that there was no lease, but a mortgage only: *Forsythe v. Bullock*, 74 *id.* 135. These cases are generally put on the ground that the plea does not impeach the landlord's title, but confesses and avoids it by proof of independent facts collateral thereto. Moreover, except where it is specifically provided that the mere filing the affidavit or plea concludes the justice, he must determine in the first instance whether the title is actually in question, and must proceed far enough into the inquiry to settle this fact. This is impliedly required in California and Nevada, where by statute the title must *necessarily* come in issue, and is so expressly held in Pennsylvania: *Essler v. McConachy*, and cases *supra*; in North Carolina, where the statute provision is, "if it appear on the trial that the title is in issue:" *Foster v. Penny*, 77 N. C. 160; though the tenant may be concluded by his plea or admission: *Heyer v. Beatty*, *supra*, and probably in Massachusetts and other States: see cases and statutes *supra*. Such also seems to be the rule in England. *Mountnoy v. Collier*, 1 Ellis & B. 630; *Emery v. Barnett*, 4 C. B. n. s. 423.

§ 11. In all the States, however, a right of removal of the proceedings upon *certiorari* probably exists, or is given by statute, and except in Georgia, Ohio, and New Jersey, and perhaps a few others, an appeal is allowed to a higher court, upon the appellant's giving bond or recognizance for costs and intervening rent. This was also the case in New Jersey, under the statute of 1861; but by statute of 1864, appeal and removal by *certiorari* were both abolished; while in Georgia, as no trial takes place before the justice, no appeal of course exists. In Ohio, the only mode of removal is by exception taken to the ruling of the court on the law or evidence. Statutes, *ubi supra*.

CHAPTER XV.

THE TENANT'S REMEDIES.

SECTION I.

ACTIONS FOR A WRONGFUL OR IRREGULAR DISTRESS.

§ 729. When Tenant may have Replevin, Trespass, or Action in the Case.— We now proceed to speak of the remedies which more appropriately belong to the tenant, and by means of which the law redresses such wrongs as he may suffer at the hands of an unjust or inconsiderate landlord. For if a landlord takes a wrongful distress, that is, a distress where no rent is due, or not so much as is distrained for;¹ or if he has been guilty of some breach of contract on his part, by means of which the tenant has sustained damages to an amount greater than the rent claimed;² or if, though rent be due at the time of the seizure, a tender of the amount is made before the goods are taken;³ or, if he takes goods which are not by law subject to distress;⁴ or, if he distrains irregularly, that is, where the distress itself is legal, but some of the pro-

¹ *Evans v. Herring*, 3 Dutch. 243; *Jones v. Murdaugh*, 2 Leigh, 447; and he is liable to an action without proof of express malice, or want of probable cause: *McElroy v. Dice*, 17 Pa. St. 163.

² *Lindley v. Miller*, 67 Ill. 244. The tenant may recoup his damages for the purpose of defeating a levy of distress or show it in replevin. *Id.*

³ *Branscomb v. Bridges*, 1 B. & C. 145; *Hunter v. Le Conte*, 6 Cow. 728. Where a sale of the distrained goods had begun, and the tenant tendered the difference between the amount so far realized from the sale and the full amount of rent due, with costs, which tender the landlord refused and continued the sale, he was held liable in trespass for the value of the goods sold after the tender. *Richards v. McGrath*, 100 Pa. St. 389.

⁴ *Niblett v. Smith*, 4 T. R. 504; *Riddle v. Weldon*, 5 Whart. 9.

ceedings thereon are not in conformity with the statutes by which they are regulated;¹ or, if he takes things privileged from distress, as by severing fixtures from the freehold, or takes beasts of the plough, while other things remain on the premises sufficient to satisfy the distress, the tenant may either rescue them before they are impounded, or maintain an action against the landlord suited to the exigency of the case, and according to the nature of the grievance. The action of replevin is the usual remedy the law gives for a return of goods wrongfully taken; but for the abuse of a distress, trespass or case is the appropriate remedy.² And a court of equity may also by injunction restrain an illegal distress for rent, on payment into court of the amount due, where there are under-tenants whose possession would be disturbed, and their goods subjected to a levy by a wrongful distress.³

§ 730. Unreasonable or Excessive Distress, what. —The ancient statute of Marlebridge (52 Hen. III. c. 4), which forms the basis of all subsequent legislation on this subject, both in England and America, enacts, “distress shall be reasonable, and not too great; and they that take unreasonable and undue distresses shall be grievously amerced, for the excess of such distress.” The remedy for a party aggrieved under this statute is by an action on the case, and not in trover, trespass, or replevin.⁴ To enable a party to maintain an action for taking an unreasonable or excessive distress, it is not necessary that express malice should be shown; it is sufficient if the goods taken appear to be greatly disproportioned to the

¹ *Joynes v. Wartman*, 5 Md. 195; *Kerr v. Sharp*, 14 S. & R. 399. Thus for executing a distress warrant in the night. *Sherman v. Dutch*, 16 Ill. 283.

² *Connah v. Hale*, 23 Wend. 462; *Perreau v. Bevan*, 5 B. & C. 284; *Mounson v. Redshaw*, 1 Wms. Saund. 195, n.; *Dalton v. Whittem*, 1 Car. & K. 961; *Co. Lit.* 160, b; *Harrison v. Barnly*, 5 T. R. 248. In Kentucky, it is held that the remedy for an unlawful distress is cumulative, the tenant having the option to declare under Gen. Sts. c. 66, Art. 2, § 26, or to proceed at common law. *Bell v. Norris*, 79 Ky. 48.

³ *Coit v. Horn*, 1 Sandf. 1.

⁴ *Hutchins v. Chambers*, 1 Burr. 589; *Whitworth v. Smith*, 1 Mood. & R. 193; *Hare v. Stegall*, 60 Ill. 380; *Lindley v. Miller*, 67 id. 244.

amount of rent due. But it is not every trifling excess that will render the landlord liable to this action; for where there is but one thing on the premises which can be taken, so that the landlord must either take it or go without his distress, an action will not lie, although the value of the thing taken greatly exceeds the amount of rent due.¹

§ 731. Liability of Landlord how fixed. — Nor is it necessary that the proceeding should have gone further than a levy under a distress warrant, in order to fix the landlord's liability; for where a landlord's agent went upon the premises of the tenant, walked around them, and gave the usual written notice that he had distrained certain goods lying there, for rent, and then went away without leaving any person in possession, it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; and that quitting the premises without leaving a person in possession was not an abandonment of the distress.² If the landlord distraints after the tenant has tendered the rent, without making a subsequent demand of it, and being refused by the tenant, an action may still be maintained for an excessive distress.³ And in such an action the tenant will not be required to prove the precise amount due.⁴ Nor does the tenant waive his right of action by entering into an arrangement with the landlord respecting the sale of the goods seized.⁵ But where the tender is not made until after the distress has been impounded, case will not lie for the detainer;⁶ nor can an action for an excessive distress be maintained after a judgment recovered in replevin.⁷ Even a lodger may maintain an action, if his goods are taken on an excessive distress, by the landlord of the party under whom he occupies.⁸ The right of

¹ *Field v. Mitchell*, 6 Esp. 71; *Willoughby v. Backhouse*, 2 B. & C. 823.

² *Swann v. Falmouth*, 8 B. & C. 456; *Bayliss v. Fisher*, 7 Bing. 153.

³ *Branscomb v. Bridges*, *supra*.

⁴ *Sells v. Hoare*, 1 Bing. 401.

⁵ *Willoughby v. Backhouse*, *supra*.

⁶ *Sheriff v. James*, 1 Bing. 341.

⁷ *Phillips v. Berryman*, Johns. N. P. Trespass, IX.

⁸ *Fisher v. Algar*, 2 C. & P. 374.

action, however, for taking an excessive distress, is said to be strictly personal, and does not pass to assignees, or personal representatives.¹

§ 732. Remedy in Trespass for Distress when no Rent due. — Trespass was the tenant's usual remedy at common law, if the landlord distrained where no rent was due. The statute 2 Wm. & Mary, c. 5, which first enabled a landlord to sell a distress that had been seized for rent, provided that if any person should distrain and sell under that act for any rent pretended to be due, when in fact no rent was due, the owner of the goods might recover double the value of the goods so distrained and sold. This statute does not apply to the case of distraining for more rent than is due, or where there is no right to distrain, but only where no rent is due. If there is any rent due, it will protect the distrainor from the penalty of paying double the value of the goods, although he may be liable in another way if he proceeds without authority.² It is to be observed, also, that the statute extends only to cases where the goods distrained have been sold; if they have not been sold, the remedy is by an ordinary action of trespass for damages, as at common law.³

§ 733. Unlawful Acts of Landlord. — At common law, a landlord cannot distrain twice for the same rent; nor can he distrain for part of the rent at one time and part at another, if there was sufficient goods upon the premises, at the time of the first distress, to have enabled him to distrain for the whole. If he does either, he is liable to the tenant for damages, either in trespass or case, at the tenant's option.⁴ So, if, after having distrained goods sufficient to pay the rent, he abandons that distress, and afterwards makes a second distress for the same rent, he is also liable for damages in either form of action.⁵ If, however, he distrains for the entire rent,

¹ O'Donnell *v.* Seybert, 13 S. & R. 54; Smith *v.* Meanor, 16 *id.* 375.

² Peters *v.* Newkirk, 6 Cow. 103.

³ Lockier *v.* Paterson, 1 Car. & K. 271.

⁴ Lear *v.* Caldecott, 4 Q. B. 123.

⁵ Smith *v.* Goodwin, 4 B. & Ad. 413; Everett *v.* Neff, 28 Md. 176.

but by mistake in the value of the goods distrained takes an insufficient distress, a second distress for such insufficiency will be lawful, although there might have been sufficient goods upon the premises to have answered the whole demand at the time of the first taking. And he may take a second distress upon goods subsequently coming upon the premises, if, in the first instance, he distrained all the goods he could then find thereon for the entire rent, and the goods did not cover the amount of the rent due.¹

§ 734. Landlord's Rights in Special Cases. — If rent is due at several days, the taking of a distress on one day for rent will be no bar to the taking of another rent on another day; nor does it matter whether the first distress was taken for the rent which last became due.² And where cattle taken and impounded as a distress die, without any fault or neglect in the distrainor, he may lawfully take another distress.³ Where a landlord has distrained for rent, and the tenant, in order to prevent a sale, has given a promissory note for the arrears then due, in which note a third person has joined as security; should the landlord again distrain for rent accruing after the period to which the note referred, and the proceeds of such second distress are not sufficient to satisfy both the demand in respect of the promissory note and also the rent subsequently accrued, they must first be applied in discharge of the note, or rather of the debt for which the note was given; since while the note remains unpaid it was merely a collateral security, not affecting the landlord's right of distress.⁴

§ 735. Distress for more Rent than is due. — Taking Exempted Property. — Case lies at common law for distraining for more rent than was due, even though the distress taken was not sufficient to pay the rent due; for though there is in such case no real damage, there is legal damage; and the action

¹ Bro. Abr. Distress, 96; *Hutchins v. Chambers*, 1 Burr. 589; *Horsford v. Webster*, 1 Cr. M. & R. 696.

² *Pamer v. Stabick*, 1 Sid. 44.

³ *Vasper v. Eddowes*, Ld. Ray. 719; *Vinkestone v. Ebden*, 1 Salk. 248.

⁴ *Heming v. Emuss*, 1 Price, 386.

lies, though the notice of distress for more rent than is due is withdrawn, and the distress is sold under a second notice, for the rent really due. Nor will the relinquishment of the excessive sum distrained for cure the wrong, any more than the return of a chattel converted would cure the conversion.¹ If a landlord takes things which are by law exempt from distress, the tenant, or person from whose possession they were taken, or the owner, if he have a right to the immediate possession, may maintain either trover, trespass, or replevin against the party restraining; or against the landlord, if he can be connected with the distress; or both. If the things have been removed and sold, the plaintiff will be entitled to their value, and to the damage he has sustained by their removal. But if they have not been removed, and the tenant has paid the rent and expenses, to prevent their removal, he will only be entitled to the actual damage sustained by the seizure.²

§ 736. Form of Action in certain Cases.—We have seen that, at common law, any irregularity or unlawful act in taking a distress made the landlord a trespasser from the beginning, and a tenant might proceed against him accordingly; but that the statute now only authorizes the party aggrieved to maintain an action of trespass, or trespass on the case, for any special damage he may have sustained by such irregularity or unlawful act. An irregularity consists in either omitting to do something necessary for the due and orderly conduct of a legal proceeding, or doing it in an unseasonable time, or improper manner. The nature of the irregularity must determine the form of action, except where, by virtue of a statute, as in New York, case may be a concurrent remedy with trespass under any circumstances. Hence, for an irregularity consisting in the omission to appraise the goods before they were sold, the action will be on the case. But where the party remained in possession of the goods in the plaintiff's house beyond five days, and then removed them, it was held

¹ *Taylor v. Henniker*, 12 Ad. & E. 488, overruling *Wilkinson v. Terry*, 1 Mood. & R. 377; *Richards v. McGrath*, 100 Pa. St. 389.

² *Harvey v. Pocock*, 11 M. & W. 740; *Niblet v. Smith*, *supra*.

that trespass was maintainable; since the removal of the goods was a distinct, subsequent, and substantive act of trespass, and the remaining in possession beyond the five days was also to be considered a new act of trespass,¹—Lord Ellenborough observing, that he could not understand the statute as giving an option to maintain trespass where trespass would not lie by the rules of the common law, but as giving an election to bring trespass where trespass was the proper remedy, and case only where case was proper.

§ 737. Irregularities which do not render the Distress unlawful.—Nor is it every mere irregularity that will subject a landlord to an action for damages; for where a landlord distrained furniture and beasts of the plough, and by the appraisement it appeared that, without the beasts of the plough, the distress would be insufficient to satisfy the rent; but upon the sale the beasts were first sold, and then part of the furniture, and it was ascertained by the result of the sale that the furniture alone would have satisfied the rent,—the tenant brought an action on the case, under the statute prohibiting beasts of the plough to be distrained so long as other goods were to be found on the premises; and the judge left it to the jury to say whether the defendant had reasonable grounds for supposing that the goods were sufficient to satisfy the rent and expenses without a sale of the beasts; for that if the original taking was lawful, the result of the sale could not make it unlawful, and there was nothing in the statute directing beasts of the plough to be last disposed of.²

§ 738. Under-tenant's Remedy in Case of Distress.—Where a tenant underlets the premises, the law implies a duty on his part to indemnify the under-tenant against all his covenants

¹ *Winterbourne v. Morgan*, 11 East, 395; *Messing v. Kemble*, 2 Camp. 115; *Ladd v. Thomas*, 12 Ad. & E. 117; *McClean v. McCaffrey*, 3 Penny. (Pa.) 406.

² *Jenner v. Yolland*, 6 Price, 4. When an excessive distress is not wanton or wilful, the only measure of damages therefor is the fair value of the goods at the place and time of the distress, cost of replacing the goods, and other actual injury, and interest. *Fernwood Ass'n v. Jones*, 102 Pa. St. 307.

with the superior landlord; and the under-tenant may have an action on the case against him for any injury he may sustain by reason of any such breach of covenant.¹ But where the under-letting was by deed, not containing a covenant to indemnify against such claims of the head landlord, the under-tenant was not allowed to maintain assumpsit against his landlord, for permitting him to be distrained upon for rent due to the head landlord; the lease being by deed, the tenant's remedy, if any, was by an action of covenant upon the implied covenant for quiet enjoyment.² But where the demise is not by deed, the proper remedy is by an action on the case, although assumpsit may also lie.³

SECTION II.

THE ACTION OF REPLEVIN.

§ 739. When it lies. — Statutory Provisions regarding. — As a common-law action, replevin has long been used to try the legality of a distress;⁴ although it is not now confined exclusively to this object (except in Connecticut and Alabama),⁵ but applies to all cases where goods and chattels have been wrongfully taken, whether under a distress or otherwise.⁶ And in general it lies for any tortious or unlawful taking of the property of another, or whenever trespass *de bonis asportatis* can be sustained.⁷ When goods have been tortiously taken,

¹ Hancock *v.* Caffyn, 8 Bing. 358.

² Schlencker *v.* Moxsy, 3 B. & C. 789; Baber *v.* Harris, 9 Ad. & E. 532.

³ Per Tindal, J., in Hancock *v.* Caffyn, *supra*.

⁴ 2 Inst. 140; Wilson *v.* Hobday, 4 M. & S. 121.

⁵ Watson *v.* Watson, 9 Conn. 140; Smith *v.* Crockett, Minor, 277.

⁶ Pangburn *v.* Patridge, 7 Johns. 140; Ilsley *v.* Stubbs, 5 Mass. 283; *Ex parte* Chamberlin, 1 Sch. & L. 320; Weaver *v.* Lawrence, 1 Dall. 156; Keite *v.* Kennedy, 16 S. & R. 300; Vaiden *v.* Bell, 3 Rand. 448; Byrd *v.* O'Hanlin, 1 Const. 401; Clark *v.* Adair, 3 Harringt. 113; Pease *v.* Simpson, 3 Fairf. 261; Chinn *v.* Russell, 2 Blackf. 174; Stat. of Ohio, 1831. Replevin lies for goods taken under the process of a court that had no jurisdiction. Mills *v.* Martin, 19 Johns. 7; or purchased at a wrongful sale: Haskins *v.* Kelly, 1 Rob. (N. Y.) 160.

⁷ Wheeler *v.* McFarland, 10 Wend. 322-349; Rogers *v.* Arnold, 12 *id.* 32; Hopkins *v.* Hopkins, 10 Johns. 369; Thompson *v.* Button, 14 *id.* 87;

even a *bona fide* purchaser under the wrong-doer is answerable to the owner, either in trover or replevin, in the *detinet* as well as in the *cepit*.¹ But not for an illegal detention of property, where the party comes to the possession by delivery, from a person having a special property only ;² nor for goods deposited with the plaintiff by a stranger who has no interest in them.³ The courts of Maine and Massachusetts have held, and the statutes of New Jersey and Indiana enact, that it lies in any case of unlawful detention, though the taking was not tortious or unlawful.⁴ So it lies in Pennsylvania, wherever one man claims goods in the possession of another, no matter how the possession of the latter was acquired ;⁵ while in Virginia it was decided that at common law replevin lay in all cases where goods were unlawfully taken.⁶ And this was the law of Virginia until 1823, when an act of the legislature confined the writ to cases of distress for rent.⁷ In South Carolina it is said not to have been decided whether replevin will lie in any other case than that of a distress for rent ;⁸ while the statutes of New York, Michigan, Illinois, Missouri, and Arkansas apply this writ to all cases of wrongful taking or detention.

§ 740. Execution of Writ. — Bond. — Pledges. — In executing the writ, the sheriff of the county in which the goods have been distrained will take them out of the hands of the landlord and his distraining officer, and replace them in the possession of the tenant, upon receiving from the tenant his bond, with sufficient sureties, in a sum double the value of the property seized ; conditioned that he will prosecute his suit with effect, and without delay, and test the validity of the distress ; and

Buffington v. Gerrish, 15 Mass. 156; *Badger v. Phinney*, *id.* 359; *Stoughton v. Rappalo*, 3 S. & R. 562.

¹ *Bennett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 *id.* 613; *Patterson v. Adams*, 7 *id.* 126.

² *Marshall v. Davis*, 1 Wend. 109; *Galloway v. Bird*, 4 Bing. 299.

³ *Harrison v. McIntosh*, 1 Johns. 380.

⁴ *Seaver v. Dingley*, 4 Greenl. 315; *Marston v. Baldwin*, 17 Mass. 606; *Baker v. Fales*, 16 *id.* 147; *Ehner*, Dig. 466.

⁵ *Weaver v. Lawrence*, 1 Dall. 156; *Keite v. Boyd*, 16 S. & R. 300.

⁶ *Vaiden v. Bell*, *supra*.

⁷ 1 *Robinson*, Pr. 408.

⁸ *Byrd v. O'Hanlin*, 1 Const. 401.

that he will restore the goods to the landlord, in case the judgment of the court shall be against the tenant. At common law, the sheriff took pledges from the plaintiff to prosecute the suit; and by statute he was required also to take pledges for a return of the beasts, if return should be awarded; but this he did at his peril, and if the security proved insufficient, he remained liable to an action on the case.¹ Where this liability exists, it is co-extensive with that which the sureties would have been under if the sheriff had done his duty and taken a sufficient bond; and as the responsibility of the sureties is limited by the statute to double the value of the goods distrained, that sum is the measure of damages against the sheriff.²

§ 741. Duties and Liabilities of the Officer as to the Bond. — The sheriff is not bound to warrant the sufficiency of the pledges at all events; for if, at the time of taking the bond,

¹ *Perreau v. Bevan*, 5 B. & C. 284. The plaintiff must give some evidence of the insufficiency of the sureties, in order to throw the burden of proof to the contrary on the sheriff. *Roscoe*, N. P. 648; *Gwyllim v. Scholey*, 6 Esp. 100; *Rex v. Lewis*, 2 T. R. 617; St. 11 Geo. II. c. 19; *Richards v. Acton*, 2 W. Bl. 1220.

² *Evans v. Brander*, 2 H. Bl. 547; *Hefford v. Alger*, 1 Taunt. 218; *Baker v. Garratt*, 3 Bing. 56; *Jeffery v. Bastard*, 4 Ad. & E. 823. In Pennsylvania, the sheriff is still held responsible for the sufficiency of the sureties at the termination of the suit, and it is no excuse for him that they were in good credit at the time the writ of replevin was executed. *Oxley v. Cowperthwaite*, 1 Dall. 349; *Pearce v. Humphreys*, 14 S. & R. 23.

In New York, the Code of Procedure, §§ 211, 212, has made a material change in the law of replevin, with respect to the possession of property seized; for if the defendant will give equal security to that which the plaintiff has given, he will, under the code, be allowed to retain the property during the litigation. It provides, "At any time before the delivery of the property to the plaintiff the defendant may require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. The defendant's sureties, upon a notice to the plaintiff of not less than four nor more than eight days, shall justify before a judge in the same manner as the sureties given by the plaintiff; and upon such justification, the sheriff shall deliver the property to the defendant."

the sureties are apparently responsible, he is not liable to an action for taking insufficient pledges.¹ But he is bound to use a reasonable discretion and caution, and whether he has done so or not is a question for a jury.² And although he is justified in taking a person as surety who is generally reputed to be a person of responsibility, yet if he knows that such person is not responsible, or if, having the means of information, he neglects to use them, he will be responsible.³ Although he is required by the statute to take a bond, yet if he neglects to do so, it is no contempt of court for which an attachment will be granted, but the proper remedy is by action on the case against him.⁴ And where a statute does not require the sheriff to take a bond from the plaintiff, his omission to take a bond with sureties does not invalidate the writ, but only subjects the sheriff to an action by the defendant.⁵

§ 742. Practice in Actions on the Bond. — Under the statute of Massachusetts, which requires a bond from the plaintiff to the defendant, it has been held that a bond from the plaintiff to the replevying officer, instead of the defendant was absolutely void.⁶ In an action against the sheriff, the sureties in the bond may be witnesses to prove whether they were sufficient or not. And if the avowant, or person making cognizance, takes an assignment of the replevin bond, and prosecutes the principal and sureties, and they are found to be insolvent or insufficient, he may afterwards bring an action upon the case against the sheriff, for taking insufficient sureties; for taking an assignment of the replevin bond from the sheriff is no waiver of any proceedings afterwards against him, as it is in the case of a bail bond. Nor does the plaintiff waive his remedy against the sureties by giving time to the principal.⁷

§ 743. Plaintiff bound to due Diligence in Prosecution. — A plaintiff in replevin who does not use diligence in prosecuting

¹ *Hindle v. Blades*, 5 *Taunt.* 225; *Sutton v. Waite*, 8 *Moore*, 27.

² *Jeffery v. Bastard*, *supra*. ³ *Scott v. Waithman*, 3 *Stark.* 170.

⁴ *Rex v. Lewis*, *supra*.

⁵ *Vaiden v. Bell*, 3 *Rand.* 448.

⁶ *Purple v. Purple*, 5 *Pick.* 226.

⁷ *Mounson v. Redshaw*, 1 *Wms. Saund.* 195, g, n.; *Moore v. Bowmaker*, 6 *Taunt.* 379; *Turnor v. Turner*, 2 *Br. & B.* 107, 112.

the suit is guilty of a breach of that part of the condition of the bond which requires him to prosecute without delay, even though it may not appear that the suit is determined; but he is not responsible for the default of the sheriff, or himself guilty of delay if the sheriff neglects to serve the summons.¹ Allowing two years to elapse without taking proceedings has been held to be a breach of the condition to prosecute without delay, and the obligee may recover on such breach, although no judgment of *non pros.* was ever signed.² To prosecute the suit *with effect* means that the plaintiff must not only proceed to a decision of the cause, but that he succeed in it also.³ But it has been held that the condition of the bond was saved when the obligor prosecuted it until the writ abated by the death of the defendant.⁴ In Pennsylvania, however, this action does not abate by the death of the defendant;⁵ nor, in Maryland, by the death of the plaintiff.⁶

§ 744. Death of Plaintiff, Effect of on the Action.—In New York it is held that the death of the plaintiff abates the suit, and that it cannot be revived by a *scire facias*; nor has the plaintiff any remedy in such case upon the replevin bond. But the temporary right of possession which the plaintiff had acquired by his writ falls with it, and the defendant may retake the goods peaceably, without suit, or, after demand and refusal, by a suit in trover or replevin.⁷ Where the property taken by the writ is a living animal, and there is judgment for its return, in an action on the replevin bond for a breach

¹ *Harrison v. Wardle*, 5 B. & Ad. 146.

² *Axford v. Perrett*, 4 Bing. 586; s. c. 1 Moore & P. 470; *Gwyllim v. Holbrook*, 1 B. & P. 410.

³ *Gould v. Warner*, 3 Wend. 54; *Pemble v. Clifford*, 3 McCord, 43; *Morgan v. Griffith*, 7 Mod. 380; *Perreau v. Bevan*, 5 B. & C. 300.

⁴ *Badlam v. Tucker*, 1 Pick. 284.

⁵ *Keite v. Boyd*, 16 S. & R. 300.

⁶ *Fister v. Beall*, 1 Har. & J. 31.

⁷ *Burkile v. Luce*, 6 Hill, 558; *Bradyll v. Ball*, 1 Bro. C. C. 427; *Woglam v. Cowperthwaite*, 2 Dall. 68; *Frey v. Leeper*, *id.* 131; *Badlam v. Tucker*, *supra*; *Merritt v. Lambert*, 8 Greenl. 128. As to third persons, however, who have acquired rights under the plaintiff in replevin during the pendency of the suit, the court in the New York case seem to doubt whether the defendant's lien was not gone, so that he could not retake the goods.

of its condition, it is a good plea that before judgment in the replevin suit the animal died, without the default of the plaintiff in the suit.¹ But in Kentucky it was held, in the case of a slave replevied, that his death pending the suit was not a valid defence on the replevin bond, and if available at all, it could only be by a plea *puis darrein continuance*.² Both the avowant and the person making cognizance may take an assignment of a replevin bond from the sheriff, and sue jointly upon it.³ The avowant may always sue, without joining the person making cognizance;⁴ and where there is no avowant named on the record, the person making cognizance may sue alone on the bond.⁵

§ 745. Liability of Plaintiff's Sureties. — The sureties in a replevin bond are only liable for the value of the goods seized and the costs; and if that value exceeds the amount of rent due, they will only be liable for the rent and costs, not exceeding the penalty of the bond in any case.⁶ Their liability is limited also to the amount of rent in arrear at the time of the distress, with costs, excluding subsequently accruing rent.⁷ If the parties to the suit, without the privity of the sureties, refer the cause to an arbitrator, and agree that the bond shall stand as security for the performance of the award, it will discharge the sureties.⁸ But where such parties referred to arbitration the time of payment of the rent, with certain claims of the tenant on the landlord for damages, with liberty for the tenant to deduct them when awarded for the rent, and agreed to suspend the proceedings in replevin pending the reference, — after an award made, it was held that the sureties in the replevin bond were not thereby discharged.⁹ And it is no plea to an

¹ Carpenter *v.* Stevens, 12 Wend. 589.

² Gentry *v.* Barnett, 6 T. B. Monr. 116.

³ Phillips *v.* Price, 3 M. & S. 180.

⁴ Archer *v.* Dudley, 1 B. & P. 381, n.

⁵ Page *v.* Eamer, 1 B. & P. 378.

⁶ Hunt *v.* Round, 2 Dowl. Pr. R. 558; Miers *v.* Lockwood, 9 *id.* 975; Bowser *v.* Lloyd, *id.* 1029; Hefford *v.* Alger, 1 Taunt. 218.

⁷ Ward *v.* Hawley, 1 Younge & J. 285.

⁸ Archer *v.* Hale, 4 Bing. 464.

⁹ Moore *v.* Bowmaker, 7 Taunt. 97; s. c. 7 Price, 223.

action against sureties, that the replevin suit was referred to an arbitrator, and that he, without the knowledge of the sureties, enlarged the time for making his award.¹ An agreement which was made a rule of court between the plaintiff and the principal, to stay all proceedings in replevin upon payment by the latter of a certain sum of money, each party to pay his own costs, was held not to be a discharge to the surety, after breach by the principal; but that the surety was liable for such sum as appeared upon a reference to be due.²

§ 746. Duties of the Officer. — The sheriff is bound to deliver actual possession of the chattels to the plaintiff; a symbolical delivery is not sufficient, unless with the consent of the plaintiff.³ At common law, he may not break an enclosure to come at the property; but by statute, if the property to be replevied, or any part thereof, be secured or concealed in any dwelling-house, or other building or enclosure, the officer must publicly demand deliverance thereof, and if the same is not delivered, he shall cause such house, building, or enclosure to be broken open, and shall make replevin according to the writ; and if necessary, he may take to his assistance the power of the county.⁴ After the execution of the writ by the delivery of the goods to the defendant, he cannot regain possession of them except by virtue of a judgment in the cause; and a writ of replevin issued by a defendant to obtain a re-delivery of the property taken from him by virtue of a replevin is irregular, and will be *superseded*, with costs, if the motion be made before the return of the writ, or *set aside* if after the return.⁵

§ 747. Claim of Property by Defendant or Another. — Practice. — By the English law, if the defendant claims property in the goods, the sheriff's power to redeliver them is suspended, and the plaintiff must sue out a writ of proving property. If on the inquest the property is found for the plaintiff, the sheriff

¹ Aldridge *v.* Harper, 10 Bing. 118.

² Hallett *v.* Mountstephen, 2 Dowl. & R. 343.

³ Hayes *v.* Lusby, 5 Har. & J. 485; McCollgan *v.* Huston, 2 Nott & McC. 444.

⁴ 2 R. S. 524, § 10.

⁵ Morris *v.* Dewitt, 5 Wend. 71.

makes deliverance ; but if found for the defendant, the replevin by plaintiff is determined, and the sheriff can proceed no further, although he may still bring a new replevin by original writ.¹ According to the practice of Pennsylvania, if the defendant claims property, the writ is not defeated, but the suit goes on, and the plaintiff gives security to deliver the goods to the defendant, if, on the trial, the property shall not be found in him.² The Revised Statutes of New York contain a provision of a similar character. If the defendant or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein, or any part thereof, the sheriff is directed to summon a jury to try the validity of the claim. If the jury find the property of the goods is not in the person claiming, the sheriff shall forthwith deliver them to the plaintiff ; but if the property is found to be in the claimant, the sheriff shall not deliver the same, unless the plaintiff in replevin shall indemnify the sheriff to his satisfaction for delivering the property claimed, and refund the costs ; and the sheriff may then deliver the goods to the plaintiff. And if the goods are not delivered to the plaintiff, he may proceed in the action for the recovery thereof, or their value.³

§ 748. What Property subject to Replevin. — It is said to be a general rule, but subject to exception, that whatever is distrainable may be replevied.⁴ It can only be supported for taking a personal chattel, and not for things affixed to the freehold ; in which latter case the remedy should be trespass ; or if the interest be in the reversion, case. But if after they are levied on, they shall be separated from the freehold, they become personal property, and may be replevied.⁵ Upon this principle, replevin lies for the detention of the young of animals distrained, which have been born since the distress.⁶ If trees are cut down upon the plaintiff's land, and converted by

¹ 1 Inst. 145, b.

² Weaver v. Lawrence, 1 Dall. 156.

³ 2 R. S. 525, §§ 13-19.

⁴ 1 Swanst. 296; Bac. Ab. Repl. F.

⁵ Cresson v. Stout, 17 Johns. 116; Niblet v. Smith, 4 T. R. 504; F. N. B. 68.

⁶ Sid. 82; Gilb. on Rep. 156.

the defendant into posts and rails, it is not such an alteration of the property as will prevent the plaintiff from recovering them in this action.¹ Replevin, however, will not lie for goods which the defendant has lawfully obtained possession of, until after a demand; for it is only from the time of a demand and refusal that the detention becomes unlawful.² And, therefore, furniture leased for a time which is yet unexpired, and attached as the property of the lessee, cannot be replevied by the owner pending the lease, as he has no right of possession.³

§ 749. Plaintiff's Right to Goods, in order to Maintain. — The plaintiff must, at the time of the caption, have had either the general ownership or a special property, as the factor, agent, or bailee, of the goods taken.⁴ A mere possessory right is not sufficient.⁵ Thus a deposit by a person who has himself no property in the goods does not give the depositary any right to replevy them; and it seems doubtful whether any other mere naked bailee for safe-keeping can maintain this action.⁶ A servant who has had charge of goods, as such only, cannot replevy; but if they were delivered to him by the master for a particular purpose, he may.⁷ It will not lie by a person out of possession of land, to recover a crop of grain cut and removed by the party in possession, although the grain was sowed by the plaintiff, and he was wrongfully ousted by the defendant; for the proper remedy is by an action of trespass *quare clausum fregit*, after regaining possession by ejectment.⁸ Several persons, having separate interests in the property distrained, cannot join in this action;⁹

¹ *Snyder v. Vaux*, 2 Rawle, 423.

² *Seever v. Dingley*, 4 Greenl. 316.

³ *Wheeler v. Train*, 3 Pick. 255.

⁴ *Dunham v. Wyckoff*, 3 Wend. 280; *Co. Lit.* 145, b; *Waterman v. Robinson*, 5 Mass. 303; *Perley v. Foster*, 9 *id.* 112.

⁵ *Pattison v. Adams*, 7 Hill, 126; *Templeman v. Smith*, 10 Mod. 25; *Wyman v. Dorr*, 3 Greenl. 183; *Wheeler v. Train*, *supra*; *Smith v. Williamson*, 1 Har. & J. 147.

⁶ *Harrison v. McIntosh*, 1 Johns. 380; *Hall v. Tuttle*, 2 Wend. 475.

⁷ *Harris v. Smith*, 3 S. & R. 20.

⁸ *Demott v. Hageman*, 8 Cow. 220; *Brown v. Caldwell*, 10 S. & R. 114; *Mather v. Trinity Ch.*, 3 *id.* 509; *Kerley v. Hume*, 3 T. B. Monr. 182.

⁹ *Hart v. Fitzgerald*, 2 Mass. 509; *Gardner v. Dutch*, 9 *id.* 427.

but joint tenants and tenants in common must join.¹ And as a part owner of a chattel cannot maintain replevin for his undivided part,² if he sues for a moiety only the court will, *ex officio*, abate his writ.³ If the cattle of a *femme sole* be taken, and she afterwards marries, the action should be in the name of the husband; for the property, being personal, is transferred by the marriage, and vests in him alone;⁴ yet the husband and wife may join when a sufficient cause for joining the wife appears.⁵ If, however, the goods are taken after marriage, husband and wife ought not to join; but if they do, and after verdict a motion is made on this ground, in arrest of judgment, it will be presumed that the husband and wife were jointly possessed of the goods before marriage, and that the goods were taken before marriage, in which case the husband and wife might join.⁶ Executors may replevy goods of the testator taken in his lifetime; for the general property is in the executor, and the possession ought to follow.⁷ But if the plaintiff has not the immediate right of possession, this is not the proper action; he must proceed by action on the case.⁸ Nor can one joint owner of a chattel maintain this action against the other.⁹

§ 750. Cases in which the Action lies. — This action lies against a landlord who takes goods which are privileged by law,—as, things protected for the sake of trade, or beasts of the plough,—while other things remain on the premises sufficient to satisfy the distress;¹⁰ or if he takes the goods of the tenant when there is no rent in arrear; or though the rent be due at the time of the seizure, if he afterwards tender

¹ Buller, N. P. 53; Co. Lit. 145, b.

² Hart *v.* Fitzgerald, *supra*; Gardner *v.* Dutch, *supra*.

³ Per Story, J., D'Wolf *v.* Harris, 4 Mason, 515.

⁴ Baker *v.* Fales, 16 Mass. 149; F. N. B. 69, R.

⁵ Serres *v.* Dodd, 5 B. & P. 405. If the wife's interest does not appear, the declaration is demurrable.

⁶ Berne *v.* Mattaire, Ca. temp. Hardw. 119.

⁷ Bro. Abr. tit. Repl. pl. 56; Bull. N. P. 54; 2 R. S. 522, § 2.

⁸ Gordon *v.* Harper, 7 T. R. 9.

⁹ McElderry *v.* Flanagan, 1 Har. & G. 308.

¹⁰ Co. Lit. 160, b; *ante*, § 729.

the amount due ; for a tender takes away the right to distrain, until a subsequent demand and refusal.¹ And if the goods are taken by one, at the command of another, the action may be brought against both, or either.² It lies not only against the person by whose direction the distress was levied, but also against him in whose custody it is found.³ But since the Revised Statutes of New York, a landlord is not liable for the unlawful execution of a distress warrant, unless he adopts and claims to avail himself of the officer's acts. And to constitute a tortious taking it is not necessary that there should be an actual manucaption of the goods ; a mere claim of dominion, or an intimation of an intention to interfere with the goods, under pretence of any right or authority, amounts to a constructive trespass, and no demand is necessary before bringing an action.⁴ The tenant may replevy at any time before the goods distrained have been actually sold.⁵ And the court will, at any time, stay all proceedings in replevin, on a distress for rent in arrear, on the application of the tenant, upon payment of the rent due according to the defendant's avowry, and of all costs up to the time of the application ;⁶ and this course is very frequently adopted, for the purpose of gaining time, and preventing a sacrifice of goods, by tenants who have been unfortunately prevented from discharging their rent in time to avoid a distress by the landlord.

§ 751. Venue of the Action.—At common law this action is strictly local, although brought for a cause of action for which trespass *de bonis asportatis* would lie, and the venue must be laid in the county in which the distress was taken ; or, if it was taken in one county and carried into another, the venue may be laid in either.⁷ The Revised Statutes of New York, however, place it among transitory actions ; but declare

¹ Slingerland *v.* Morse, 8 Johns. 476; Huntley *v.* Le Conte, 6 Cow. 728.

² 2 Roll. Abr. 431; Watson, Sheriff, 297.

³ Allen *v.* Crary, 10 Wend. 349; Flewster *v.* Royle, 1 Camp. 187.

⁴ Connah *v.* Hale, 23 Wend. 462; Reynolds *v.* Shuler, 5 Cow. 326; Wintringham *v.* Lafoy, 7 *id.* 735.

⁵ Jacob *v.* King, 5 Taunt. 451. ⁶ Vernon *v.* Wynne, 1 H. Bl. 24.

⁷ Williams *v.* Welch, 1 Wend. 290; F. N. B. 29, i; Robinson *v.* Mead, 7 Mass. 353.

that when this action is brought for the recovery of goods or chattels distrained for any cause, it shall be laid in the county in which the distress was *made*, and not elsewhere.¹ The plaintiff also is bound to show the place where the distress was taken, or at least a place in which the landlord has had it in custody;² but an omission of this character may be cured by the defendant's pleading over.³

§ 752. Form of Declaring. — The declaration in this action must conform to the writ; and where the writ is for the *taking* and *detention* of property, the plaintiff cannot declare for the wrongful detention alone.⁴ The goods taken must be described with certainty, although in this respect the same strictness does not prevail as formerly.⁵ But an allegation of taking *divers goods and chattels of the plaintiff*, without specifying them, is bad for uncertainty; and though a judgment pass by default for the plaintiff, the defect is not obviated.⁶ The nature and quantity of the goods must be described with such certainty that the sheriff may be able to make re-deliverance of them, though the tenant will not be bound to prove the exact quantity, but may recover less than the declaration alleges.⁷

§ 753. Defendant's Pleas in. — To the declaration, the defendant either pleads in bar or abatement, or makes cognizance or avowry. And at common law a landlord, or other person interested in the premises, if not made a defendant, or a lessee for life or years where the defendant avowed upon the title, might *pray in aid* of his lessor, that he be called in to defend and be made a party to the suit. This proceeding has been abolished in many of the States; but to provide for those cases in which the reversioner or remainder-man may

¹ 2 R. S. 522, § 3.

² Walton *v.* Kersop, 2 Wils. 351; Abercrombie *v.* Parkhurst, 2 B. & P. 480; Ward *v.* Lavile, Cro. El. 896.

³ Gardner *v.* Humphreys, 10 Johns. 53.

⁴ Nichols *v.* Nichols, 10 Wend. 629.

⁵ Taylor *v.* Wells, 2 Saund. 74, b.

⁶ Pope *v.* Tillman, 7 Taunt. 642.

⁷ Berne *v.* Mattaire, Ca. temp. Hardw. 119.

desire to come in and defend, the practice which prevails in ejectment has been adopted by the Revised Statutes of New York.¹ The general issue in replevin is *non cepit modo et forma*, by which the defendant puts in issue not only the taking, but also the taking in the place mentioned in the declaration.² The extension of the action by statute in New York rendered it necessary to furnish a new general issue, which should be also conformable to the action of detinue.³ In Virginia, a defendant in replevin cannot plead several matters of defence; although he is allowed to do so in Indiana.⁴

§ 754. Effect of Certain Pleas.—Of the General Issue. — The plea of *cepit in alio loco* does not admit the taking as laid in

¹ 2 R. S. 520, § 43. "No aid prayer shall be allowed in this action; but any person having an estate in the lands or tenements upon which the distress in question was made may, upon special cause shown to the court, and on such terms as it shall think equitable, be made a co-defendant in the action, or be permitted to defend separately, as the case may require."

² *Potter v. North*, 1 Saund. 347; *Anon.*, 2 Mod. 199; *Walton v. Kersop*, 2 Wils. 535.

³ 2 R. S. 529, §§ 39, 40, 44, 45, where it is enacted: "When the wrongful taking of the property described in the declaration is complained of, the plea of the general issue shall put in issue not only the taking of such goods and chattels, but such taking in the place stated. If the action is founded on the wrongful detention only, and the taking is not complained of, this plea shall put in issue not only the detention of the goods and chattels, but the property of the plaintiff therein. . . . With the plea denying the taking or detention of the property claimed, the defendant may give notice of any matters which, if properly pleaded, by avowry, cognizance, or plea, would be a bar to the action, and which if the goods have been replevied, would entitle him to a return thereof; and he may give such matters in evidence on the trial, in the same manner, and with the like effect, as if the same had been so pleaded. And the plaintiff may plead in answer to any avowry or cognizance as many several matters as he shall think necessary for his defence." Although the New York Court of Procedure has entirely remodelled and simplified the action of replevin, we yet continue our reference to the Revised Statutes of that State, as containing the best exposition of the general principles of pleading in this action; as well as being the basis of that legislation which is still in force in many of the States.

⁴ *Vaiden v. Bell*, 3 Rand. 448; *Martin v. Ray*, 1 Blackf. 291.

the declaration, and the plaintiff is bound to show his right to recover in the same manner as if the plea of *non cepit* had been interposed. Under this plea, a defendant will not be permitted to give special matter in evidence, by way of justification.¹ Where a plaintiff replies a claim of property to a plea justifying a taking of goods, under a plaint in replevin, he must designate the time of the claim with precision, so that issue can be taken on it. An averment of a claim at the said time when, &c., referring to the day laid in the declaration, is not sufficient on special demurrer. The place of taking, as well as the village or parish, is material and traversible, and, for want of such averment, the declaration is demurrable; and if the taking was in a different place from that mentioned in the declaration, he may plead *non cepit*, and give that fact in evidence, and nonsuit the plaintiff.² But the defendant cannot have a return of the goods under this plea; and, therefore, if he wants a return, he must plead that he took the goods in some other place, describing it, and traverse the place laid in the declaration; and, in order to have a return, avow or make cognizance, stating the cause for which he distrained.³ Nothing in arrear is equivalent to the general issue, when pleaded in bar to an avowry.⁴ The general issue, strictly speaking, puts in issue every material averment;⁵ not so, however, the plea of *riens in arrear*. It admits the title of the defendant as stated in the avowry, which, therefore, need not be proved, unless the plea be accompanied by a plea of non-tenure.⁶

§ 755. **Cognizance and Avowry.** — In answer to the declaration, the landlord may *avow* the taking, and show his right, and the cause for which he took them; or if the landlord's bailiff have made the distress, and the action be against him, he must make *cognizance* by which he acknowledges the tak-

¹ Williams *v.* Welch, 5 Wend. 290; McFarland *v.* Barker, 1 Mass. 153.

² Lisher *v.* Pierson, 2 Wend. 345; Potter *v.* North, *supra*; Johnson *v.* Wollyer, 1 Stra. 507; Anon., 2 Mod. 199.

³ Crosse *v.* Bilson, 6 Mod. 102; Anon., 1 Vent. 127.

⁴ Harrison *v.* McIntosh, 1 Johns. 380.

⁵ Rogers *v.* Arnold, 12 Wend. 30.

⁶ Bloomer *v.* Jubel, 8 Wend. 448.

ing in right of his principal, and shows the landlord's right. Where the suit is against both, the one avows and the other makes cognizance. An avowry is in the nature of a declaration, to which the plaintiff may be compelled to plead or answer, as in other actions. It sets forth the nature and merits of the defendant's case, showing that the distress taken by him was lawful, and is proper in all cases where he expects to have a return.¹ Formerly more strictness was required in pleading an avowry or cognizance, as well in setting forth the matter in avoidance as in stating the title which formed the inducement than in a declaration.² The landlord was bound to show a complete title, and if possessed of a term of years only, he was obliged to show the estate out of which his term was derived; because particular estates being created by agreement of the parties out of the primitive estate, it was the office of the court to judge whether the primitive estate and agreement were sufficient to produce the particular estate.³ In all cases the avowry must still contain sufficient matter to entitle him to a return.⁴ To obviate the difficulties which the avowant had to encounter, in setting forth a long and intricate title, the statute 11 Geo. II. c. 19, § 22, enabled defendants in replevin to avow or make cognizance in general terms;⁵ that the plaintiff, or other tenants of the lands whereon the distress was made, enjoyed the same under a grant or demise, at a certain rent, during the time wherein the rent distrained for was incurred, which rent was then in arrear; and that the place where the distress was taken was parcel of the tenements for which the rent became due.

§ 756. Avowry in New York. — This provision much simplified the ancient practice, and was first introduced into New York by the Revised Statutes. It is still necessary, however,

¹ Bac. Abr. tit. Replevin; Potter *v.* North, 1 Saund. 347.

² Silly *v.* Dally, 1 Ld. Ray. 331.

³ Silly *v.* Dally, *supra*; Reynolds *v.* Thorpe, 1 Stra. 796.

⁴ Hopkins *v.* Hopkins, 10 Johns. 369; Goodman *v.* Aylin, Yelv. 148; Reynolds *v.* Thorpe, *supra*; Silly *v.* Dally, *supra*; Bain *v.* Clark, 10 Johns, 424.

⁵ Roulston *v.* Clarke, 2 H. Bl. 563.

that an *avowry* should distinctly show a compliance with every provision of the statute applicable to the case, and of every other fact which entitles the party to distrain. Thus, it must show a demise;¹ and care must be taken that it is correctly stated.² The defendant must also show who is tenant,³ although he need not state in express terms that he is tenant to the avowant; and if the fact of the tenancy can be collected from the whole of the avowry, it will be sufficient.⁴ It must appear at what rent the premises were held, and when payable;⁵ but a defendant has been allowed to recover rent for a less period than he claimed by his avowry to be due to him.⁶ If substantially bad in part, it is bad for the whole. Thus in an avowry for rent, upon taking goods in a place off the demised premises, if only part of the rent avowed for be the subject of distress, the avowry is bad *in toto*.⁷ But where the avowry described the premises as a dwelling-house with the appurtenances, and it appeared in evidence to be but the upper part of the house that the plaintiff held as tenant, the shop and yard being let to another person, this was held to be no variance.⁸

§ 757. **Plea of Tenant in Avowry.**—The statute just referred to has done away with the necessity of any special pleading in this action; but independent of the statute, to an avowry or cognizance the tenant may plead, denying the demise or tenure as set forth in the avowry, and throw the issue upon the defendant,—who must then prove the demise. But if he only shows an agreement for a lease, it is insufficient,⁹ unless the tenant has occupied and paid rent.¹⁰ And the terms of the tenancy must be proved as laid; for a variance as to the amount of rent is fatal,¹¹ though it is not a

¹ *Hayward v. Haswell*, 6 Ad. & E. 265.

² *Philpott v. Dobbinson*, 6 Bing. 104.

³ *Banks v. Angell*, 7 Ad. & E. 843.

⁴ *Innes v. Colquhon*, 7 Bing. 265.

⁵ *Smith v. Walton*, 1 Moore & S. 380; *Laycock v. Tufnell*, 2 Chit. 531.

⁶ *Forty v. Imber*, 6 East, 434. ⁷ *Burr v. Van Buskirk*, 3 Cow. 263.

⁸ *Page v. Chuck*, 10 Moore, 264.

⁹ *Dunk v. Hunter*, 5 B. & A. 322. ¹⁰ *Knight v. Bennett*, 3 Bing. 361.

¹¹ *Brown v. Sayce*, 4 Taunt. 320.

material variance, if it appear that the plaintiff holds for a less term than that stated in the avowry.¹ An avowry or cognizance for rent admits the property of the goods in the plaintiff; but if the plaintiff's plea subsequently shows the property of the goods to be in another, the plaintiff cannot maintain the action.² The tenant may also show that the demise was bad in law by reason of the coverture³ or infancy of the plaintiff;⁴ or if good, that the defendant evicted the plaintiff;⁵ that the rent was tendered before suit brought;⁶ that the defendant had been satisfied by a former distress,⁷ or that nothing is in arrear.⁸ A set-off cannot be pleaded to an avowry for rent;⁹ but plaintiff may plead in bar that he had paid a sum for ground-rent, or taxes, &c.¹⁰ A plea of *non-tenure* to an avowry for rent, setting forth seisin in A. B., and deducing title from him to the avowant, and also showing a reversionary interest in the avowant after the termination of the demise under which the distress was made, admits the seisin of the demise to the avowant from the tenant of the freehold,— it only puts in issue the demise under which the distress was taken.¹¹ But a plea to an avowry that the landlord holds under a title which in law amounts to a mortgage, but which has not been recorded, and that the plaintiff holds under the same person from whom the landlord derives title, by a *bond fide* purchase for a valuable consideration, is good, and a complete answer to the avowry. Nor does such plea amount to a disseisin, inasmuch as it shows that the relation of landlord and tenant does not exist; for the rule that a tenant shall not plead *nil habuit in tenementis* applies only where there is a tenancy in fact.¹²

¹ Forty *v.* Imber, 6 East, 484; Harrison *v.* Barnby, 5 T. R. 248.

² Clarke *v.* Davies, 7 Taunt. 72.

³ Clarke *v.* Davies, *supra*.

⁴ Wilson *v.* Ames, 1 Marsh. 74.

⁵ Hunt *v.* Cope, Cowp. 242.

⁶ Pim *v.* Greville, 6 Esp. 95; Bull. N. P. 60.

⁷ Lingham *v.* Warren, 2 Brod. & B. 36.

⁸ Cobb *v.* Bryan, 3 B. & P. 348.

⁹ Absolon *v.* Knight, Barnes, 450; Laycock *v.* Tufnell, 2 Chit. 531.

¹⁰ Stubbs *v.* Parsons, 3 B. & A. 516; Bradbury *v.* Wright, 2 Doug. 625.

¹¹ Bloomer *v.* Juhel, 8 Wend. 448.

¹² Brown *v.* Dean, 3 Wend. 208.

§ 758. **Place.—Abuse of Distress.—How Pleaded.**—The place of taking a distress for rent is material and traversable; and where the defendant in his avowry states the precise place or house, the plaintiff may traverse the place in the avowry, though not described with certainty in the declaration. But where the plaintiff does not traverse the place in the avowry, but joins issue on the tenancy, the *locus in quo* is rendered immaterial; and the plaintiff may show the taking of the goods in another place than the house demised, especially where the goods were removed from such house, leaving the rent unpaid, and were seized within thirty days thereafter. If the plaintiff means to make the place material, he must, in his plea in bar, or replication to the avowry, traverse the taking in the place alleged in the avowry, and take issue thereon.¹ The plaintiff may plead in bar to the avowry, that the avowant so abused the distress as to render himself a trespasser *ab initio*; but a plea of *de injuria, &c.*, generally would be bad;²—for he must take issue upon some particular allegation in the avowry.³ An officer sued for an act done by virtue of his office may give any special matter in evidence under the plea of the general issue, without notice,⁴ and has all the rights, and is entitled to the same judgment which a defendant, not an officer, is entitled to under a plea of the general issue, with notice of the special matter.⁵ The plea of property in a stranger, or in the defendant himself, may be pleaded either in abatement or in bar, and entitles the party to a return without an avowry.⁶ Such plea, however, must contain a traverse of the right of the plaintiff, and if issue be taken upon such plea by replication affirming the property to be in the plaintiff, the material inquiry for the jury is whether the property is in the plaintiff.⁷

¹ Jackson *v.* Rogers, 11 Johns. 33.

² Hopkins *v.* Hopkins, 10 Johns. 369.

³ *Id.*; Jones *v.* Kitchin, 1 B. & P. 76. ⁴ Coon *v.* Congdon, 12 Wend. 496.

⁵ Seymour *v.* Billings, 12 Wend. 285.

⁶ Harrison *v.* McIntosh, 1 Johns. 380; Quincy *v.* Hall, 1 Pick. 357; 1 Vent. 249; Martin *v.* Ray, *supra*. But *nil habuit in tenementis* is no plea to an avowry for rent. Parry *v.* House, Holt, 489; Syllivan *v.* Stradling, 2 Wils. 208.

⁷ Ingraham *v.* Hammond, 1 Hill, 353; Lisher *v.* Pierson, 2 Wend. 345;

§ 759. Verdict in Avowry; its Effect. — If the plaintiff fails to establish an exclusive right to possess and control the property, the defendant is entitled to a verdict. But a defendant will not be entitled to a return of the goods by simply showing property in a stranger; he must connect himself with the title of the stranger, and thus establish a right paramount to that of the plaintiff, justifying the taking of the property out of his possession.¹ Where a plea of property in a stranger is interposed, as well as of *non cepit*, a verdict for the plaintiff upon the latter plea determines nothing between the parties but the taking; and the plaintiff is not entitled to recover unless the other issue be also found for him.² On an issue in which the plaintiff to an avowry for rent pleads, denying the seisin of the landlord, the demise, the tenancy, and the assignment of the plaintiff, evidence that the defendant in replevin holds by virtue of a deed from the grantor of the plaintiff, executed to him as a security for the payment of money, and that the conveyance to the plaintiff was recorded and the deed to the defendant not recorded, entitles the plaintiff, and not the defendant, to a verdict.³ And although a tenant may not dispute his landlord's title after paying him rent, yet, if by mistake or misrepresentation he pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of *non tenuit* in replevin against the supposed landlord, whatever tends to show that the latter is not entitled to the rent.⁴

§ 760. Avowry by Joint Tenants and Tenants in Common. — **Executors.** — **Husband.** — Tenants in common must avow for their separate portions; joint tenants may either join or sever;⁵ but if one joint tenant or tenant in common have distrained for the rent due for both shares, and the action be

Tuley v. Mauzey, 4 Ky. 6. The failure of the officer to set apart property under a claim of exemption is not a defence in replevin. *Lloyd v. Underkofler*, 13 Phila. 160.

¹ *Rogers v. Arnold*, 12 Wend. 30.

² *Bemus v. Beekman*, 3 Wend. 667.

³ *Brown v. Dean*, 3 Wend. 208.

⁴ *Rogers v. Pitcher*, 6 Taunt. 202.

⁵ *Harrison v. Barnby*, 5 T. R. 246.

brought against one, he should avow for his own share, and for the other share make cognizance as bailiff of his co-tenant.¹ If, however, the defendants make cognizance, first, as bailiffs of A. and B., and, secondly, as bailiffs of A., — B. will not be a competent witness for the defendant to sustain the second cognizance, though the defendants gave no evidence to sustain the first cognizance, and offered to abandon it.² An avowry by an executor must show affirmatively that the rent fell due before the testator's death.³ Where the defendant in his avowry averred that the plaintiff, as his tenant, held and enjoyed certain premises for the space of seven years and six months, under a certain demise and at a certain rent, and by the evidence it appeared that the premises were held by the plaintiff only six years and six months, the variance was adjudged to be fatal.⁴ It is not necessary to aver that the rent continued in arrear at the time of making the avowry.⁵ Nor is the sum stated in the avowry to be due for rent material; for if it appears that less rent is due than defendant has avowed or made cognizance for, he is yet entitled to recover for so much as is due.⁶ But where the avowry is for parcel of a year's rent or penalty only, it ought to show that the residue has been satisfied or discharged, otherwise it will be bad on demurrer.⁷ If the avowry be for a certain amount, part whereof is not due at the time of the distress, and judgment is entered for the whole, it will be error; but it may be cured before judgment by abating the avowry as to the part not yet due.⁸ An avowry justifying the taking a distress for the rent of ready-furnished lodgings is good; it having been determined that a landlord is entitled to distrain for the rent of ready-furnished lodgings.⁹ And where the husband

¹ Pullen *v.* Palmer, 5 Mod. 73.

² Girdlestone *v.* McGowran, 1 Car. & K. 702.

³ Wright *v.* Williams, 5 Cow. 338, 501.

⁴ Tice *v.* Norton, 4 Wend. 663. ⁵ Clarke *v.* Davies, 7 Taunt. 72.

⁶ Per Lord Ellenborough in Forty *v.* Imber, 6 East, 437.

⁷ Shepherd *v.* Boyce, 2 Johns. 448; Hunt *v.* Braines, 4 Mod. 402; Johnson *v.* Baynes, 12 *id.* 84; Holt *v.* Sambach, Cro. Car. 104.

⁸ Duppia *v.* Mayo, 1 Wms. Saund. 285, n. 6, 8; Harrison *v.* Barnby, 5 T. R. 246.

⁹ Newman *v.* Anderton, 5 B. & P. 224.

distraints and avows for rent arising from the land of the wife, without joining her in the proceeding, he must show affirmatively that the rent accrued after the marriage, for this cannot be intended; and if that fact be not shown, the objection may be taken at the trial.¹ According to the practice of Pennsylvania, an avowry need not state for what lands the rent arose, nor when it became due.²

§ 761. **Practice in Avowry.**—An avowry showing a conclusive bar to the action is a perfect pleading, requiring an answer, although it immediately follows a plea of property in a stranger; and it is not to be considered as matter pleaded to induce a return of the property; a party under such plea being entitled to a return without avowry or cognizance.³ But an avowry of taking goods off the demised premises, for rent arrear, should show affirmatively that possession continued on the part of the tenant, if the lease has expired; or it will be bad on general demurrer.⁴ Both parties are actors in replevin, the plaintiff in respect of his action, and the defendant by reason of his having made the distress, this being a claim of right; and the avowry being in the nature of a declaration, either may notice the cause for trial; yet, at common law, neither party can move for judgment as in case of nonsuit.⁵ And the jury may give such damages as they think the party is entitled to for the injury sustained.⁶ Where a plaintiff in replevin to an avowry for rent pleads a tortious eviction by the landlord, such plea is not sustained by proof that the landlord entered by virtue of *summary proceedings* for the non-payment of rent. And although such entry be found by special verdict, the tenant is not entitled to judgment in this action for goods subsequently taken as a distress for rent, where he pleads *a tortious eviction*. To enable him to avail himself of such entry in bar of a distress for rent, he should

¹ Decker *v.* Livingston, 15 Johns. 479.

² Albright *v.* Pickle, 4 Yeates, 264; Weidell *v.* Roseberry, 13 S. & R. 180.

³ People *v.* New York, C. P. 2 Wend. 644.

⁴ Burr *v.* Van Buskirk, 2 Cow. 263.

⁵ Barrett *v.* Forrester, 1 Johns. Cas. 247.

⁶ Dorsey *v.* Gassaway, 2 Har. & J. 402; Bruce *v.* Learned, 4 Mass. 614.

specially plead the resort of the landlord to the other remedy. But, on the contrary, the landlord under such verdict, is entitled to judgment *non obstante veredicto*.¹

§ 762. Judgment in Avowry. — If the plaintiff recovers, he has judgment for damages only, provided the goods have been delivered to him.² But the judgment for the avowant, or person making cognizance, varies in different cases; it may be at common law *pro retorno habendo*, or founded on the statutes.³ If the property specified in the declaration shall not have been delivered to the plaintiff on the replevin, he shall, in case the judgment is in his favor, be entitled, in addition to his judgment for damages and costs, to a further judgment that the property be returned to him without delay, or in default thereof, that he recover from the defendant the value of such goods and chattels, as assessed by the jury on the trial, or upon a writ of inquiry.⁴ If the property specified in the writ have been delivered to the plaintiff, and the defendant recover judgment, the judgment shall be that the defendant shall have return of the property replevied, unless he elects to waive such return; and also that he recover damages for the detention of the property, to be ascertained by a writ of inquiry.⁵ But without the aid of this statute, where there is no other plea than *non cepit*, the defendant is not entitled to a return, for this is not a plea involving the merits of the action; and he can only have a return in cases where he adds an avowry, or cognizance, or some plea leading to the conclusion that taking the goods was not merely unjustifiable, but that the defendant was rightfully in possession of them at the time they were taken out of his possession by

¹ McCarty v. Hudsons, 24 Wend. 291.

² Easton v. Worthington, 5 S. & R. 130; Powell v. Hinsdale, 5 Mass. 343; F. N. B. 69. And such damages will include what results from the landlord's breach of his contract, but not remote, speculative, or particular damages. Prescott v. Otterstatter, 79 Pa. St. 462.

³ See the cases in Mounson v. Redshaw, 1 Wms. Saund. 195, n. 3; Poole v. Longuevill, 2 id. 286, n. 5.

⁴ 2 R. S. 530, § 49.

⁵ Id. 531, § 53; Clark v. Adair, 3 Harringt. 113.

the writ of replevin.¹ And it is now held that a defendant in replevin who succeeds on the trial under the plea of *non detinet* is not entitled to a return of the property, or its value, unless he proves property in himself, as well as a detention; nor then, perhaps, unless he has pleaded or given notice of such matter as will entitle him to a return.²

§ 763. **Execution in Avowry. — Service of.** — The execution is the same as in ordinary cases, by *fieri facias*; if the plaintiff have judgment, for damages and costs, or if the defendant, for the arrears of rent or the value of the distress. And if the defendant have judgment for a return, he may have a writ *de retorno habendo* for a return of the things distrained, besides a *fi. fa.* for his costs.³ The sheriff, however, is not bound to execute the writ for a return, unless some person attend, on behalf of the defendant, to show him the goods; and it is a good return to the writ that no person attended for the purpose. At common law, if to a writ of *retorno habendo* the sheriff return that the goods are eloigned (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant might sue out a *capias in withernam*, requiring the sheriff to take other cattle of the plaintiff, to the value of the cattle eloigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver him the cattle originally replevied. If this writ was returned *nihil*, after an *alias* and *pluries*, the defendant might sue out a *scire facias* against the plaintiff's pledges, to show cause why the price of the cattle, &c., eloigned should not be made of their lands and goods, and rendered to the defendant. If no good cause was shown, a writ issued to take the cattle, &c., of the pledges; but if they had none, a *scire facias* issued against the sheriff himself, requiring him to show cause why he should not render to the defendant cattle, &c., to the value of those eloigned.⁴ This circuitous method, however, of proceeding against the sheriff might be avoided, by bringing an action on the case against him for damages, on the return of

¹ *People v. Niagara*, C. P., 4 Wend. 217.

² *Pierce v. Van Dyke*, 6 Hill, 613.

³ 3 Archb. Pr. 84.

⁴ *Taylor v. Wells*, 2 Wms. Saund. 74, b; *Mounson v. Redshaw*, *supra*.

the *elongata*.¹ The writ of *withernam* is a common-law re-prisal, calculated to take from the defendant goods to such an amount as will secure the return of the plaintiff's; and follows a return of *elongata* on the writ of replevin, without an *alias* or *pluries*, in the State of South Carolina, under the statute of that State passed in 1808.² It is incident to the common-law action of replevin, and is in force in all those States that have not expressly abolished it.³

SECTION III.

ACTION OF TRESPASS.

§ 764. By Tenant; for what Injuries it lies. — If the tenant should be turned out of, or disturbed in the possession of the demised premises, by a stranger having no title, his only remedy is by an action of ejectment or trespass, if he is actually put out; or by trespass or case (according to circumstances), if he is merely disturbed in the possession. Trespass is the proper remedy to recover damages for an illegal entry upon, or an *immediate* injury to, property real or personal; while case lies for *consequential* damages to such property, or to some right or privilege incident thereto. But if the tenant is put out of possession by a stranger having title, where the ouster comes within the meaning of the landlord's covenant and agreement for quiet enjoyment, express or implied, he may also proceed against the landlord for damages, by an action upon such covenant or agreement.⁴

§ 765. Illegal Entry a Trespass. — Between Disseisor and Party in Possession. — The right to land is exclusive, and

¹ Richards *v.* Acton, 2 W. Bl. 1220; Page *v.* Eamer, 1 B. & P. 378; Tesseyman *v.* Gildart, 4 *id.* 292.

² Swann *v.* Shemwell, 2 Har. & G. 283.

³ Gould *v.* Warner, 3 Wend. 54; Hart *v.* Tobias, 2 Bay, 408; Huggeford *v.* Ford, 11 Pick. 223.

⁴ Seneca R. R. *v.* Auburn R. R., 5 Hill, 170; Hayward *v.* Bankes, 2 Burr, 1114; Rex *v.* Watson, 5 East, 486; Rex *v.* Wilson, 11 *id.* 56.

every unwarranted entry by a person, or his cattle, on the land of another, without the owner's leave, whether it be enclosed or not, or unless he enters by authority of law, is a *trespass*.¹ Thus an *entry* on land, without claim or color of title;² under a void lease;³ or under a mere executory contract;⁴ or a continuance there after a request to leave, or even going upon another's land and taking away one's own property, is a trespass.⁵ A disseesee may have trespass against a disseisor for the disseisin itself, because he was then in possession; but not for an injury after the disseisin, until he hath gained possession by re-entry, and then he may support this action for an intermediate damage.⁶ But it does not lie against a person coming in under the disseisor.⁷ So where the defendant is put into possession under a writ of restitution, on an indictment for a forcible entry against the plaintiff, and the proceedings are afterwards quashed and restitution awarded, the plaintiff may maintain trespass against the defendant, but not against a person acting under license from him.⁸

¹ *Wells v. Howell*, 19 Johns. 385; *Adams v. Freeman*, 12 *id.* 408; 3 Bl. Com. 209; *Commonwealth v. Peters*, 2 Mass. 127; *Brown v. Perkins*, 1 Allen, 89; *ante*, §§ 174, 524.

² *Jackson v. Holden*, 2 Johns. 22; *Tonawanda R. R. v. Munger*, 5 Den. 255.

³ *Chandler v. Edson*, 9 Johns. 362. So where the defendant entered into possession of premises under the expectation of taking a lease, but refused to accept it or to remove after demand. *Welch v. Winterburn*, 25 Hun, 437.

⁴ *Erwin v. Olmsted*, 7 Cow. 229.

⁵ *Blake v. Jerome*, 14 Johns. 406; *Kissecker v. Monn*, 36 Pa. St. 313. A recent law of New York declares that any person who shall intrude or squat upon any city, town, or village lot, without license from the owner, or who shall, without such license, erect any hut, shanty, or other structure thereon, shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment. The owner may give notice to any person who may have already entered to remove in not less than ten days, and if they remain after that period, they shall also be guilty of a misdemeanor, and liable to similar punishment. After the expiration of said ten days, the owner may also cause such erection to be removed and abated as a nuisance, and the intruders and squatters to be themselves removed. *Laws of 1857*.

⁶ *Toby v. Webster*, 3 Johns. 471; 2 Roll. Abr. 553; *Dyer*, 985.

⁷ *Liford's Case*, 11 Co. 46.

⁸ *Case v. Degoes*, 3 Caines, 261; *Wickham v. Freeman*, 12 Johns. 184.

§ 766. **Acts constituting Trespass.** — So for any entry on a highway, which is inconsistent with the right of the owner of the soil, and not necessary to the right of way of the public ; or where one enters and builds upon the land of another, who enters upon the intruder, and the intruder in his turn enters and turns the owner out of possession, the owner may in either case, maintain this action.¹ And a direct injury to anything growing or placed upon the land is an injury to the land itself.² In general, where an erection is made upon the land of another, without his consent, and is afterwards continued there without such consent, the continuance is deemed to be a fresh trespass ; and the party injured may maintain an action of trespass from time to time, even although he may have brought an action for the original erection, and shall have recovered damages.³ But where A. and B., owning adjoining lands, agreed that B. might cut ditches on A.'s land, and under A.'s direction, and continue so long as he should be satisfied ; and the ditches were dug and used during A.'s lifetime, and for three years afterwards, without complaint,— it was held that although the license to use the ditches on A.'s land expired on his death, and the person succeeding to his title might fill them up if he thought proper to do so, he could bring no action against B. without first giving reasonable notice to discontinue the use of the ditches.⁴

§ 767. **Unlawfully taking or injuring Property.** — Any unlawful taking of or injury to personal property, of a forcible nature, amounts to a trespass, even though the defendant had

In New Jersey, under the statute, the landlord is liable for any unlawful act done in the conduct of summary proceedings against the tenant. *Coe v. Haines*, 15 Vroom, 134.

¹ *Colden v. Eldred*, 15 Johns. 220; *Babcock v. Lamb*, 1 Cow. 238.

² By the Revised Statutes of New York any person injuring or destroying trees or wood without license, is liable in treble damages, unless the trespass was involuntary, or with probable cause to believe the property his own. And any one forcibly kept out of possession, may have trespass with treble damages against the party ousting him. 2 R. S. 338, §§ 1, 2, 4.

³ *Holmes v. Wilson*, 10 Ad. & E. 503.

⁴ *Carter v. Page*, 4 Ired. 424.

no intention of committing a trespass ; for the injury forms the ground of action, the intention being wholly immaterial.¹ And though the property is only taken for an instant, or the goods be restored, still the action lies, and the restoration of the goods only goes in mitigation of damages.² An actual dis- possession is not necessary, but any unlawful interference with the property of another, or exercise of dominion over it by which the owner is injured, is sufficient to support this action.³ But where a defendant, claiming a sum of money to be due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which he held of defendant, and in which the plaintiff had put them, kept the key, and refused plaintiff access to them, saying that nothing should be removed until plaintiff's bill was paid, the court held that there was no such dispossess of the goods as would sustain an action of trespass.⁴

§ 768. Incorporeal Rights not the Subjects of. — The prop- erty to be affected must in general be something tangible and fixed, as a house, room, outhouse, or other building, or land ; even though the land be not fenced in from the property of others, or be a highway,—the term *close* being technical and signifying the interest in the soil, and not merely an enclosure in the common acceptance of the term.⁵ And trespass lies though the door of a house be open, or the *locus in quo* un- enclosed.⁶ A person having a mere incorporeal right, as of common of pasture, cannot support trespass *quare clausum fregit*, for treading down the grass growing upon the land upon which he has such right of common ; for though he has a right to pasture his cattle there, he has no exclusive right

¹ *Seneca R. R. v. Aub. R. R.*, 5 Hill, 170; *Sanderson v. Baker*, 2 W. Bl. 832; *Reeves v. Slater*, 7 B. & C. 486. As to what particular acts amount to a trespass and what not, see *Hartley v. Moxham*, 3 Q. B. 401.

² *Price v. Helyar*, 4 Bing. 597-604; *Bac. Abr. Trespass*, E. 669-674.

³ *Allen v. Craig*, 10 Wend. 349.

⁴ *Hartley v. Moxham*, 3 Q. B. 701; *Suffern v. Townsend*, 9 Johns. 35; 4 Kent, Com. 118.

⁵ *Van Rensselaer v. Van Rensselaer*, 9 Johns. 377; *Harrison v. Parker*, 6 East, 154; *Stammers v. Dixon*, 7 id. 207; *Goodtitle v. Alker*, 1 Burr. 133.

⁶ *Co. Lit.* 4, b; *Bac. Abr. Trespass*, F. 679.

of possession to the land.¹ But wherever an exclusive right exists, trespass will lie, though the party has not the absolute right to the soil, or the whole property therein.² And though the possession must be exclusive, it need only be so to the extent of the trespass; for a party who has dedicated a street to the public may, notwithstanding, maintain trespass for any injury to the soil thereof, because he has the exclusive possession of the freehold.³ For injuries to real property incorporateal, as a franchise, right of way, or common, inasmuch as the property cannot be affected immediately or tangibly by any substance, no injury thereto can be considered as having been committed with force, and consequently trespass will not lie.

§ 769. Right to Immediate and Exclusive Possession essential to maintain. — In trespass to personality, it is essential that the plaintiff be in possession or entitled to the immediate possession of the property, at the time the trespass was committed; for it is a possessory action, and lies only in favor of the party who has an immediate right of possession. And if the right of possession at the time is in another, the plaintiff's interest is merely reversionary; and trespass will not, in general, lie by a reversioner.⁴ The general owner, who has an absolute property in chattels, may maintain trespass, though he has never had actual possession, if he be entitled to the immediate possession; because a general property in personality gives a constructive possession. But if the general owner

¹ Stocks *v.* Booth, 1 T. R. 428; 2 Roll. Abr. 522, N. pl. 8; Bac. Abr. Trespass, C. 3; Wilson *v.* Mackreth, 3 Burr. 1824; Welden *v.* Bridgewater, Cro. El. 421.

² Harker *v.* Birkbeck, 3 Burr. 1563; Wilson *v.* Mackreth, *supra*; Blackett *v.* Lowes, 2 M. & S. 499; Stultz *v.* Dickey, 5 Binn. 285.

³ Lade *v.* Shephard, 2 Stra. 1004; Mayor *v.* Ward, 1 Wils. 110.

⁴ Putnam *v.* Wylie, 8 Johns. 432; Smith *v.* Milles, 1 T. R. 480; Ward *v.* Macauley, 4 *id.* 489; Penton *v.* Robart, 2 East, 88. When a reversioner sues for an injury to his reversion, he must show an injury so permanent in its nature as to affect the value of his reversionary interest; for if the injury only affects the possessory interest, the party in possession should sue. Bell *v.* Twentyman, 1 Q. B. 766; Raine *v.* Alderson, 6 Scott, 691. What amounts to such an injury, see Tucker *v.* Newman, 3 Per. & D. 14.

has given another a special property as against himself, he cannot maintain trespass, because he has no immediate right of possession.¹ The plaintiff must also, at the time of the trespass, have been entitled to the exclusive possession as against the defendant, although the duration of his interest may be limited. Therefore one tenant in common, joint tenant, or parcener, cannot maintain trespass, but only case, against the other, for an abuse of the thing in common, as by holding exclusive possession thereof ; but if he destroys it he may maintain trespass, as such destruction amounts to a severance of the tenancy.² The pulling down of a wall, however, by a tenant in common, in order to rebuild it, does not amount to destruction if rebuilt.³

§ 770. Action lies for Severance of Fixtures, when. —Where a tenant under color of the law of fixtures, wrongfully severs from the freehold articles put up by himself during the term, or which have been demised to him together with the premises, the landlord cannot, pending the lease, support an action against him for trespass *quare clausum fregit*.⁴ But where fixtures have been severed from the freehold, and reduced again to a chattel state, the party in whom the right of property is vested, from the time of severance, may support trespass *de bonis asportatis* for the removal ; for the general property of personal chattels draws to it the possession. The reversioner may, therefore, sustain this action against a tenant in possession, pending a lease, for the removal of things which the tenant, either from the circumstance of their having been demised to him, or for any other reason, has no right to take away.⁵ Yet a tenant, after the severance of articles to which

¹ *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Mather v. Trinity Church*, 3 S. & R. 513; *Gordon v. Harper*, 7 T. R. 9; *Bertie v. Beaumont*, 16 East, 33; *Wilbraham v. Snow*, 2 Saund. 47, note a.

² *Wilson v. Mackreth*, 3 Burr. 1824; *Voyce v. Voyce*, 201; *Wilbraham v. Snow*, 2 Saund. 47, h; *Holliday v. Camsell*, 1 T. R. 658. Whoever has an exclusive right to the soil, as to grow a crop of wheat thereon, may maintain this action. *Austin v. Sawyer*, 9 Cow. 39.

³ *Cubitt v. Porter*, 8 B. & C. 257. ⁴ *Dyer*, 121; *Co. Lit.* § 71.

⁵ *Udal v. Udal*, Aleyn, 81; *Bowles's Case*, 11 Co. 81; *Ward v. Andrews*, 2 Chit. 636; *Farrant v. Thompson*, 5 B. & A. 826.

he is not entitled as fixtures, cannot maintain trespass against his landlord, or a stranger, for removing them.¹ And if the tenant is entitled to emblements after the determination of his term, he may maintain trespass against his landlord for forcibly preventing his taking them away.² But a tenant who wrongfully continues in possession of the premises after the expiration of his term, although he does not abandon his right of property to the fixtures, is still liable to be sued in trespass *quare clausum fregit* if he enters to take them away; for his property in the fixtures does not give him a right of being on the premises.³

§ 771. For Felling and Carrying away Trees, when. — If trees are excepted in a lease, the land on which they grow is excepted also, and the landlord may enter to fell and take away the trees;⁴ but an exception of underwood does not except the land on which it grows.⁵ And the possession remaining in the lessor, or other party entitled to the trees, he may maintain *trespass* against the lessee, or a stranger, for breaking and entering his close and cutting them down, and trespass *de bonis asportatis* for carrying them away; but not for injury done to the trees by the tenant's cattle;⁶ but the lessee cannot maintain any action, because he has no interest in the trees.⁷ Yet, where the trees are not excepted in the lease, the tenant has a right to their shade and fruit; and a sufficient possession to maintain trespass against any party, either landlord or stranger, for cutting them down, but is not himself liable to the landlord in trespass for cutting them down.⁸ But when cut they belong to the party who has the next estate of inheritance in the land, or the tenant for life without impeachment of waste (if there be one), and the tenant cannot bring trespass *de bonis asportatis* for carrying them

¹ *Id.*; *Evans v. Evans*, 2 Camp. 491.

² *Stewart v. Doughty*, 9 Johns. 208.

³ *Holmes v. Tremper*, 20 Johns. 29-32; *Penton v. Robart*, 2 East, 88.

⁴ *Pomfret v. Ricroft*, 1 Saund. 322, b.

⁵ *Legh v. Heald*, 1 B. & Ad. 622.

⁶ *Co. Lit.* 57; *Glenham v. Hanby*, 1 Ld. Ray. 739.

⁷ *Rolls v. Rock*, 2 Selw. N. P. 1287; *Ashmead v. Ranger*, 1 Ld. Ray. 552.

⁸ *Pomfret v. Ricroft*, *supra*.

away; such action must be brought by the owner of the next estate of inheritance, or tenant for life, without impeachment of waste.¹ And if a stranger cut them down, both landlord and tenant, or party entitled to the trees subject to the lease, may each maintain an action against him for his respective loss, and the one action is no bar to the other.² So a grantee of trees may maintain this action against the owner of the soil, for cutting them down;³ or a lessee for years, who on the expiration of the tenancy, is, by the custom of the country, entitled to the away-going crop.⁴ And if a man lets a farm to be worked upon shares, the landlord may have this action against a stranger for treading down the corn;⁵ or the landlord and tenant may maintain a joint action.⁶

§ 772. For Injury to Realty, Person in Actual Possession may maintain. — Examples. — A similar rule prevails with regard to trespass upon realty. A right of property is not always required for this purpose, as actual possession is sufficient against any party who cannot show better title, or as against a mere wrong-doer.⁷ Thus a party in possession of lands under a mere parol license or even an intruder thereon, as against a wrong-doer, may maintain trespass.⁸ So of a carpenter in possession of premises to repair them.⁹ It may also be observed that if a person having a legal right of entry on land enter by force, though he may be indicted for a breach

¹ *Evans v. Evans*, 2 Camp. 491; *Blackett v. Lowes*, 2 M. & S. 499. But not if wrongfully cut by the landlord himself. *Channon v. Patch*, 5 B. & C. 897.

² *Clerke v. Pywell*, 1 Saund. 319, e.

³ *Clap v. Draper*, 4 Mass. 266. An assignment of a tree for house-bote, by a bailiff pursuant to the terms of the lease, entitles the tenant to fell the tree after the discharge of the bailiff. *Courtenay v. Fisher*, 4 Bing. 3. It is said that the property in the trees, if cut down by a stranger, is in the landlord, and the property in the bushes in the tenant. *Berriman v. Peacock*, 9 Bing. 384.

⁴ *Stultz v. Dickey*, 5 Binn. 285.

⁵ *Buller*, N. P. 85; *Wilson v. Mackreth*, 3 Burr. 1824; *Co. Lit.* 4, b.

⁶ *Foot v. Colvin*, 3 Johns. 216.

⁷ *Stuyvesant v. Dunham*, 9 Johns. 61; *Graham v. Peat*, 1 East, 246; *Catteris v. Cowper*, 4 Taunt. 574; *Harper v. Charlesworth*, 4 B. & C. 574.

⁸ *Harper v. Charlesworth*, *supra*. ⁹ *Hall v. Davis*, 2 Car. & P. 33.

of the peace, yet he is not liable to a private action of trespass for damages at the suit of the person who has no right and is turned out of possession.¹ And where a tenant holds over his term and the landlord enters by force and turns him out, he cannot maintain trespass against the landlord.² So a party who has obtained possession by force has not a sufficient possession to maintain trespass against the owner for a removal of his goods off the land.³

§ 773. To maintain, Constructive Possession sufficient in the United States.—By the rule prevailing in England in regard to trespass upon real property, there is no constructive possession; and unless the plaintiff has the actual possession, by himself or servant, at the time the injury was committed, he cannot support the action.⁴ But in this country we have carried the principle, as to real property, further than has been done in England; and the owner is allowed to maintain trespass without an actual entry, on the principle that possession follows the ownership unless there be an adverse possession.⁵ Where land is vacant, therefore, or the actual possession cannot be shown, the person having the legal title will be deemed

¹ *Erwin v. Olmsted*, 7 Cow. 229.

² *Hyatt v. Wood*, 4 Johns. 150; *ante*, §§ 531, 532.

³ *Brown v. Dawson*, 4 Per. & D. 355.

⁴ *Bertie v. Beaumont*, *supra*; *Bac. Abr. Tresp. c. 3*; *Ball v. Cullimore*, 1 *Gale*, 96.

⁵ *Van Brunt v. Schenck*, 11 Johns. 385; *Wickham v. Freeman*, 12 Johns. 183; *Bush v. Bradley*, 4 Day, 306; *Lunt v. Brown*, 13 Me. 236; *Rowland v. Rowland*, 8 Ohio, 40; *Anderson v. Nesmith*, 7 N. H. 167. For all purposes of the remedy the law annexes a constructive possession to the right of possession; and where the owner, having been ousted for a time, is by entry or ejectment finally restored, the law adjudges his possession never to have been discontinued. *Jackson v. Sellick*, 8 Johns. 270; *Davis v. Clancy*, 3 McCord, 422; *Peareson v. Dansby*, 2 Hill (S. C.), 466; *Propr's v. Call*, 1 Mass. 483; *Kennedy v. Wheatly*, 2 Hayw. 402; *Smith v. Wilson*, 1 Dev. & B. 40. But until he is so restored to possession he cannot maintain trespass for mesne profits. *Smith v. Wunderlich*, 70 Ill. 426. If he shows a right of possession at the time the defendant went in, this continues to the time of the recovery and re-entry, and he is then considered as having been in possession according to his right. *Dewey v. Osborn*, 4 Cow. 329; *Morgan v. Varick*, 8 Wend. 587; *Leland v. Tousey*, 6 Hill, 328.

to be in possession so as to maintain trespass, and the landlord of a tenant at will may bring trespass against him for any voluntary waste, because such injury would determine the tenancy, and the landlord become entitled to the possession.¹ Where any other tenancy exists he cannot, however, sue in trespass, even for an injury to the freehold.²

§ 774. Against Intruders on Land. — Against Landlord. — If one having title takes possession of land, he may treat as trespassers all those who afterwards come upon it;³ or who, having unlawfully taken possession in the first instance, wrongfully continue on the land. As where a remainderman entered upon a party in possession by intrusion, it was held that trespass lay by the remainder-man against the intruder.⁴ On the other hand a tenant for years may support trespass against even his own landlord;⁵ but a tenant at sufferance, or strictly at will, although either may maintain trespass against a wrong-doer, cannot do this as against the landlord, for by his entry the tenancy is determined.⁶ It is, however, otherwise with a general tenant at will.⁷

§ 775. License to Owner to enter. — When implied. — The owner's license to enter may, however, be frequently presumed, and will then be equally valid as if expressly given; and for all purposes of this action, a tenant in possession is to

¹ *Van Rensselaer v. Radcliff*, 10 Wend. 639; *Wickham v. Freeman*, *supra*; *Kennedy v. Wheatly*, 2 Hayw. 402; *Hubbell v. Rochester*, 8 Cow. 115; *Revett v. Brown*, 5 Bing. 7.

² *Tobey v. Webster*, 3 Johns. 468; *Lienow v. Ritchie*, 8 Pick. 235; *Tobey v. Reed*, 9 Conn. 216; *Cooke v. Thornton*, 6 Rand. 8; *Addleman v. Way*, 4 Yeates, 218; *Allen v. Thayer*, 17 Mass. 299.

³ *Hey v. Moorhouse*, 8 Scott, 156.

⁴ *Butcher v. Butcher*, 7 B. & C. 399.

⁵ *Pomfret v. Ricroft*, 1 Saund. 322, n. 5.

⁶ *Hyatt v. Wood*, 4 Johns. 150, 313; *Harper v. Charlesworth*, 4 B. & C. 574; *ante*, §§ 531, 532.

⁷ *Dickinson v. Goodspeed*, 8 Cush. 119; *Hilbourn v. Fogg*, 99 Mass. 11; *Cunningham v. Horton*, 57 Me. 420. So where the lessee holds over by permission of the lessor until the latter shall notify him to quit. *Gunsolus v. Lormer*, 54 Wisc. 630.

be considered the owner. But whether express or implied, the license may at any time be revoked, unless it has been founded on such a valuable consideration as would support a contract, and a subsequent entry would then become a trespass.¹ But a parol license to do an act on one's own land, injuriously affecting the air and light of a neighbor's house, is not revocable by the neighbor after it has once been acted on, nor is such a license within the Statute of Frauds.² And when a license is given, it necessarily implies a right to do everything without which the act could not be done.³ A tenant from year to year, being desirous of letting his house for a quarter, quitted and left it locked, with authority to the landlord to let it during his absence if an opportunity offered, and for that purpose left the key with a neighbor; an opportunity offered of letting the house, but the person who had the key having absconded, the landlord entered by placing a ladder against the house, and raising the first-floor window; and after showing the house, left it in the same state as before. The house was afterwards entered by persons unknown, and some of the tenant's wearing-apparel and furniture stolen; and the tenant having brought an action of trespass against the landlord for breaking and entering the house and leaving it insecure, in consequence of which his furniture and apparel were stolen, it was held that a plea of leave and license was no answer to the action.⁴ So in a case where the landlord, upon making a distress, turned the tenant's family out of possession, and continued in possession himself, after the rent was paid, he was held to be guilty of a trespass.⁵ If a man sells a chattel which is upon his land, he at the same time passes to the vendee, as incident to such sale, a right to go upon the premises and take away the subject of his purchase, without being considered a trespasser.⁶ So if a man, in virtue of his license, erects a building on another's land, this license cannot be revoked so entirely as to make the person

¹ *Baker v. Dumbolton*, 10 Johns. 240; *ante*, § 524.

² 3 Kent, Com. 451. ³ *Dennett v. Grover, Willes*, 195.

⁴ *Ancaster v. Milling*, 2 Dowl. & R. 714.

⁵ *Etherton v. Popplewell*, 1 East, 139.

⁶ *Parker v. Staniland*, 11 East, 336.

who erected it a trespasser for entering and removing the building after the revocation.¹

§ 776. Abuse by Landlord of Lawful Authority.—Wrongful Distress.—Authority to enter on land is sometimes given to a landlord by law,—as, to see that the tenant keeps the premises in good repair, according to agreement, or to levy a distress; but if, in such case, the authority is abused, the party at common law becomes a trespasser from the beginning, and his original entry, and every act done in pursuance of it, is viewed in the same light as if the law had not given him authority in the first instance.² And in strictness, if the landlord accidentally committed an irregularity, either in taking a distress or in any subsequent proceeding (whether for rent or damage feasant), he thereby became a trespasser from the beginning, and was immediately liable to an action of trespass on the part of the tenant.³ Such is still the law in regard to a distress for damage feasant; but as to a distress for rent, trespass lies only where the distress is altogether wrongful and illegal *ab initio*,—as, where no rent is due, or the distress is made after a tender of the amount due;⁴ or, in general, wherever the particular act of irregularity amounts to a trespass independent of the previous proceedings.⁵ Thus it lies for turning a tenant out of possession under a distress warrant; or, if a tenant tenders the rent and expenses after the distress, but before impounding, for subsequently removing the distress;⁶ but not for selling after a tender, where such

¹ *McNeal v. Emerson*, 15 Gray, 384, 385.

² *Allen v. Crofoot*, 5 Wend. 506; *Oxley v. Watts*, 1 T. R. 12.

³ *Griffin v. Scott*, 2 Ld. Ray. 1424; *Dye v. Leatherdale*, 3 Wils. 20; *Dod v. Monger*, 6 Mod. 216.

⁴ F. N. B. 88; *Gorton v. Falkner*, 4 T. R. 565; *Shipwick v. Blanchard*, 6 *id.* 298. But for taking more than the amount due trespass will not lie, unless it is done maliciously. *Harms v. Solem*, 79 Ill. 460.

⁵ *Aitkenhead v. Blades*, 5 Taunt. 198; *Reed v. Harrison*, 2 W. Bl. 1218. Where the warrant of dispossession was executed before the time allowed by law, both the officer and the plaintiff were held to be trespassers. *Pausch v. Guerrard*, 67 Ga. 319.

⁶ *Virtue v. Beasley*, 1 Mood. & R. 21.

tender is made after the impounding.¹ And though the party may, in these cases, bring trespass, he may also waive the trespass and bring case.²

§ 777. **Trespass concurrent Remedy with Trover, when.**— Either trespass or trover will lie in the case of a distress for rent, where there has been an illegal taking,—as, for distraining implements of trade, or beasts of husbandry, where there was a sufficiency of other property;³ or a horse, while his rider was upon him;⁴ or if taken when the outer door was shut.⁵ For the statute which enacts that a party distraining for rent shall not be a trespasser from the beginning, only relates to irregularities after a taking which was originally lawful.⁶ So that wherever there is an abuse of an authority which has been given *by law*, the party injured may not only prosecute his action for trespass for the illegal entry, but may also sue in trover, and recover the value of the goods.⁷ But an abuse of an authority *in fact*, that is, of an authority given by the party, does not render a man a trespasser *ab initio*.

¹ Ellis *v.* Taylor, 8 M. & W. 415; Thomas *v.* Harris, 1 Scott, N. R. 524; Ladd *v.* Thomas, 4 Per. & D. 9.

² Branscomb *v.* Bridges, 1 B. & C. 145. These rules of law, with a salutary modification as to a tender of amends, passed into an enactment in the Revised Statutes of New York, which declared: "When any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not therefore be deemed unlawful, nor the party making it a trespasser from the beginning; but the party aggrieved may maintain an action of trespass, or of trespass on the case, and may recover full satisfaction for the special damages he may have sustained by such irregularity or such unlawful act, with full costs of suit and no more, unless tender of amends hath been made by the party distraining, or his agent, before such action brought; which tender shall prevent the recovery of any costs in such action." 2 R. S. 505, § 28; 11 Geo. II. 6, 19, § 19.

³ F. N. B. 88; Gorton *v.* Falkner, *supra*; Hutchins *v.* Chambers, 1 Burr. 579.

⁴ Moore *v.* Beaumont, 6 T. R. 138.

⁵ Etherton *v.* Popplewell, 1 East, 139; Winterbourne *v.* Morgan, 11 *id.* 395; Messing *v.* Kemble, 2 Camp. 115.

⁶ Wallace *v.* King, 1 H. Bl. 13:

⁷ Thus trover lies for selling the distress without an appraisal. Tripp *v.* Grouner, 60 Ill. 474.

Thus if a bailee of chattels abuses his authority, he is only liable in case for the abuse. And if a distress taken for a rent-charge is abused, the distrainer does not become a trespasser *ab initio*; because such a distress must at common law be made under an authority in fact, as a right to distrain is not by such law incident to a rent-charge.¹

§ 778. For a continuing Nuisance. — A party may sue for the continuance of a nuisance, though erected before he was possessed of the property in respect of which he sues.² Trespass lies against either the party who erected it, even though he has no right to enter upon the land to abate it, or against the occupant who continues it, because every continuance of it is a fresh nuisance.³ In general the owner is not liable as such for a nuisance after a demise, it then being a mere non-feasance, but he may be liable as the original erector; and if he demised the land after erecting a nuisance, he is liable for the continuance of it, though out of possession as the demise affirms it.⁴ But the owner, though not in possession, is liable for a nuisance arising from non-repair, when he is by covenant the party to repair; if otherwise, the occupant is the party liable.⁵ And so the landlord is liable if he lets premises, the natural consequence of the regular use of which is that they will become a nuisance unless attended to.⁶

§ 779. Case and Trespass, when each lies. — According to strict common-law principles, the distinction between case and trespass formerly adverted to becomes important when determining upon the proper remedy for an injury; for if a plaintiff declares in trespass when his action should be case, he will be nonsuited at the trial. His declaration, however,

¹ 3 Starkie, Evid. 1108 (3d edit.). Where several persons are implicated in or have assented to the joint act of trespass, the damages must be assessed against all jointly, though all may not have been equally culpable. Eliot *v.* Allen, 1 C. B. 18; Hill *v.* Goodchild, 5 Burr. 2790.

² Thompson *v.* Gibson, 7 M. & W. 456.

³ *Id.*; Penruddock's Case, 5 Co. 101, a.

⁴ King *v.* Pedley, 1 Ad. & E. 822; Payne *v.* Rogers, 2 H. Bl. 349.

⁵ Cheetham *v.* Hampson, 4 T. R. 318; Payne *v.* Rogers, *supra*.

⁶ King *v.* Pedley, *supra*.

will be held sufficient if it contains enough to maintain case, although it may commence by miscalling the action trespass.¹ As a general rule, where a statute gives damages for an injury, and does not mention the form of action, case lies.² But where an action may be sustained at common law, and a statute also gives an action, without expressly or impliedly taking away the common-law right, an action may be maintained at common law, as well as upon the statute.³

§ 780. Case lies for Consequential Injuries. — We have said that case is the appropriate remedy where the injury is not immediate but consequential. Thus it lies against a sheriff for removing goods from the demised premises without satisfying the landlord's claim for a year's rent.⁴ But he is not liable unless he knew that rent was due; although express notice is not necessary to render him liable; in which respect, we have observed the law of New York differs from the English law.⁵ Case is also the proper remedy where a distress for rent is either illegal or irregular;⁶ or at the suit of a lodger whose goods are taken upon an excessive distress by the superior landlord; and even in those cases where trespass may be maintained, case also lies, as a party may waive the trespass and bring case.⁷

§ 781. Abuse of Distress. — Excessive Distress. — For an abuse of a distress, trespass is the proper remedy;⁸ but for impounding cattle in a wrong county, the landlord will not be liable in trespass.⁹ Nor will trover lie for goods irregularly sold under a distress;¹⁰ or for an excessive distress;¹¹

¹ *Seneca R. R. v. Aub. R. R.*, 5 Hill, 170.

² *Huddersfield Can. Co. v. Buckley*, 7 T. R. 36; *Cane v. Chapman*, 1 Nev. & P. 104.

³ *Com. Dig. Action on Statute C.*

⁴ *Reed v. Thoysts*, 6 M. & W. 410; *Forster v. Cookson*, 1 Gale & D. 58; *Arnitt v. Garnett*, 3 B. & A. 440.

⁵ *Smith v. Russell*, 3 Taunt. 400; *Andrews v. Dixon*, 3 B. & A. 645.

⁶ As for an excessive distress. *Hare v. Stegall*, 60 Ill. 380.

⁷ *Branscomb v. Bridges*, 1 B. & C. 145; *Fisher v. Algar*, 2 C. & P. 374.

⁸ *Hutchins v. Chambers*, 1 Burr. 590.

⁹ *Gimbart v. Pelah*, 2 Stra. 1272. ¹⁰ *Wallace v. King*, 1 H. Bl. 13.

¹¹ *Whitworth v. Smith*, 1 Mood. & R. 193.

since the statute gives another remedy; and trespass only lies where there has been some act done which in itself amounts to a trespass,—the election given by the statute being so construed.¹ So trespass cannot be maintained for taking an excessive distress,—where the distress was lawful, the whole being one entire act;² nor for an irregular distress, where the irregularity complained of is not in itself an act of trespass, but consists merely in the omission of some form required in conducting the distress, such as not procuring goods to be appraised before they are sold; but case is the proper remedy in all such cases.³ Yet if the landlord fails to show a right to distrain,—as, if the affidavit accompanying the warrant of distress is defective,—he is liable in this action.⁴

§ 782. Principle to determine Form of Action to be brought.

— In general it may be said that wherever the act complained of is under regular process of law, case is the only remedy, and trespass will not lie;⁵ but where it is not under color of process, the remedy is trespass and not case. Thus if the process be irregular,⁶ or if the court has no jurisdiction,⁷ or exceeds its jurisdiction,⁸ the action should be either trespass or trover; that is, trespass for the act itself, and trover, if the goods be detained, to recover them back. If, however, a proceeding is instituted in a court not having jurisdiction, yet if it were malicious or unfounded, it has been held that the plaintiff may bring either case or trespass.⁹

¹ *Ladd v. Thomas*, 4 Per. & D. 9; *Winterbourne v. Morgan*, 11 East, 395; *Messing v. Kemble*, 2 Camp. 115.

² *Lynne v. Moody*, 2 Stra. 851.

³ *Messing v. Kemble*, 2 Camp. 115; *Marquissee v. Ormston*, 15 Wend. 368.

⁴ *Id.*; and see *Alcott v. Frazer*, 5 Hill, 562.

⁵ *Johnston v. Sutton*, 1 T. R. 544; *Morgan v. Hughes*, 2 *id.* 225; *Belk v. Broadbent*, 3 *id.* 185.

⁶ *Elsee v. Smith*, 1 Dowl. & R. 97.

⁷ *Perkin v. Proctor*, 2 Wils. 382; *Case of the Marshalsea*, 10 Co. 76, a; *Branwell v. Penneck*, 7 B. & C. 536.

⁸ *Cocker v. Crompton*, 1 B. & C. 489.

⁹ *Gates v. Bayley*, 2 Wils. 313; *Mayor v. Ward*, 1 *id.* 107.

§ 783. Case for Damages when it lies.—An action on the case for damages is the proper remedy whenever the plaintiff has merely a reversionary interest in the property, the possession being in another, for the erection of any kind of nuisance;¹ or for not repairing a privy near to plaintiff's house; for not emptying a cesspool or sewer;² for manufacturing candles or erecting a forge;³ for undermining a house;⁴ for obstructing the entrance to a house;⁵ for not sustaining a sea-wall—whereby plaintiff's property was injured;⁶ for cutting down trees to the shade of which the plaintiff was entitled as occupant of the messuage; for keeping a slaughterhouse near the plaintiff's house, or erecting a building from which the water ran on plaintiff's house, whereby it was injured; for continuing an iron manufactory, and making noises and annoying the plaintiff in the occupation of his house;⁷ or for excavating the defendant's ground too close to the foundations of the plaintiff's house (he having acquired a right to the support of the defendant's land), whereby its fall was accelerated.⁸

§ 784. Case for Injury to Incorporeal Rights.—Case is also the appropriate remedy for any disturbance or other wrong to incorporeal property, as of a franchise, or right of common; for the obstruction of a private way; the neglect to repair a way which the defendant was bound to keep repaired; or by a reversioner, for an injury done to his reversionary interest by building thereon.⁹ Also for the disturbance of an easement or privilege over another's land; or in a sink,

¹ *Reynolds v. Clarke*, 2 Ld. Ray. 1399.

² *Russell v. Shenton*, 3 Q. B. 449. ³ *Bradly v. Gill*, 1 Lutw. 69.

⁴ *Smith v. Martin*, 2 Saund. 397; *Bradbee v. Christ's Hosp.*, 2 Dowl. P. C. n. s. 164.

⁵ *Taylor v. Cole*, 3 T. R. 292; *Cheetham v. Hampson*, 4 *id.* 318.

⁶ *Mayor v. Henley*, 1 Bing. N. C. 222; s. c. 3 B. & Ad. 77.

⁷ *Elliottson v. Feetham*, 2 Bing. N. C. 184.

⁸ *Wyatt v. Harrison*, 3 B. & Ad. 871; *Dodd v. Holme*, 1 Ad. & E. 493; *Chadwick v. Trower*, 8 Scott, 1.

⁹ *Seneca R. R. v. Aub. R. R.*, 5 Hill, 170; *Mellor v. Spateman*, 1 Saund. 346, a; Com. Dig. Action on the case, Disturbance, A 2; *Coryton v. Lethebye*, 2 Saund. 113; *Yard v. Ford*, *id.* 172, a.

gateway, or washing-place in another's ground;¹ or for obstructing the use of the door-bell, knocker, skylight, staircase, or water-closet, by a lodger in a house. A tenant may also render himself liable to his co-tenant for damages in this action, by obstructing his use of the premises.² For the same reason, trespass cannot be supported for a *non-feasance*, for where there has been no act there can be no force;³ and therefore *case* is the proper *remedy* for a mere detention of goods, without an unlawful taking; a neglect to repair the banks of a river, whereby the plaintiff's land was overflowed; or for a neglect to redeliver a beast distrained damage-feasant, when sufficient amends were tendered before the beast was impounded.⁴

§ 785. Action Personal.—Statutory Exception in New York.

—The right of action for a trespass is at common law strictly personal, and does not survive against the personal representatives of the deceased trespasser; though if his estate has been benefited by the trespass, it may be made responsible to that extent in another form of action. But the Revised Statutes of New York authorize this action to be brought against the executor or administrator of any testator or intestate who in his lifetime shall have wasted, destroyed, or carried away the chattels of any such person, or committed trespass on the real estate of any such person.

¹ *Wilson v. Smith*, 10 Wend. 324; *Mainwaring v. Giles*, 5 B. & A. 361; *Hewlins v. Shippam*, 5 B. & C. 221.

² *Underwood v. Burrows*, 7 C. & P. 26; *Browning v. Dalesme*, 3 Sandf. 13.

³ *Reynolds v. Clarke*, 1 Stra. 636; *Turner v. Hawkins*, 1 B. & P. 476; *Shapcott v. Mugford*, 1 Ld. Ray. 187.

⁴ *Seneca R. R. v. Aub. R. R.*, *supra*; *Wilbraham v. Snow*, 2 Saund. 47, k; *Six Carpenters' Case*, 8 Co. 146; F. N. B. 93.

CHAPTER XVI.

OF FORCIBLE ENTRY AND DETAINER.

§ 786. **History of the Action.**—A forcible entry and detainer consists in violently taking or keeping possession of lands or tenements, by force or with threats, and without authority of law. The exercise of this privilege was, at common law, allowed to every person disseised of his lands, unless an entry had been taken away, or barred, by his neglect to enter in due time. But this licentious course of procedure, by giving an opportunity to powerful men, under the pretence of feigned titles, to eject their weaker neighbors, or by force to retain a wrongful possession, was found to be so prejudicial to the public peace that it became necessary to restrain men from the use of all violent methods of doing themselves justice. The statutes of the several United States, corresponding substantially with those of the prohibitory English statutes, declare that no entry shall be made into any lands or other possessions but in cases where an entry is given by law; and in such cases only in a peaceable manner, and not with strong hand, nor with multitude of people. The statutes then proceed to punish any violation of the law by imprisonment, as a public offence; and at the same time restore to the aggrieved person the possession of the premises from which he had been forcibly ejected or detained. The proceedings were originally in the form of a criminal prosecution, and an indictment will still lie at common law for the violence;¹ but by the gradual addition to the statute of provisions looking to the restitution of the property to the party dispossessed, the remedy has become a private rather than a public one, although the form

¹ *Pullen v. Boney*, 1 South. 125; *Cruiser v. State*, 3 Harr. 206.

of proceeding, and the rules of law which govern it, remain to a great degree unchanged.¹

¹ 2 N. Y. R. S. 507, § 1; *ante*, § 728 *a*, n., cases and statutes cited; 5 Rich. II. St. 1, c. 7; 15 Rich. II. c. 2; 8 Hen. VI. c. 9; 31 Eliz. c. 11; 21 Jac. I. c. 15. The distinction must be kept in mind which we have pointed out earlier in this volume between this proceeding and the ordinary summary process, by which the landlord recovers the premises from the tenant; although both are included in one form of remedy under many statutes. *Ante*, §§ 717 and note, 728 *a* and note. In Massachusetts the court says: "For a long series of years, it has been the law of this commonwealth that this writ might be used for the purpose of restoring to his possession a landlord whose tenant is holding his estate after his right to hold it has ceased. And although this writ is used, and the process is frequently called a process of forcible entry and detainer [now, Summary Process for the Recovery of Land, Pub. Sts. c. 175], yet it is not strictly a process of forcible entry and detainer, but it is given as a remedy to a landlord whose tenant holds without right, whether by force or not; but in such case it is always limited to the case of a tenant; for, the tenancy having been proved, the title of the landlord could not be brought in question, and the only issue which could be tried is whether the rights of the tenant under the lease had expired." *Hodgkins v. Price*, 132 Mass. 196. In the same State when a mortgage of real estate is foreclosed, the person having a valid title to such estate, if kept out of possession by a person without right may have this process to put him into possession. Pub. Sts. c. 175, §§ 1, 7. This proceeding, which goes solely upon the employment of force in getting or holding possession, was first given by the Stat. 5 Rich. II. which simply punished by imprisonment. Restitution was given first by the 8 Hen. VI., but to freeholders only; and the 21 Jac. extended this to tenants for years. In England, therefore, one having less title than a tenancy for years cannot have restitution as the fruit of this process. But in the United States generally a different rule has been adopted, and only a bare possession is required. To the same effect is the forcible entry and detainer act of New Jersey of 1846, § 5. So in Minnesota, G. S. 1878, c. 84, §§ 11, 12; *Engels v. Mitchell*, 30 Minn. 122; *Burton v. Rohrbeck*, *id.* 393; and see *Steele v. Bond*, 28 *id.* 267; *Brown v. Brackett*, 26 *id.* 292. So in Michigan, *Miller v. Havens*, 51 Mich. 482, and in California, where, in order to maintain the action, thirty days' notice must be given to terminate the tenancy, and afterwards, three days' notice to surrender possession. Code, § 791, *Martin v. Spivalo*, 56 Cal. 128, and see *Newman v. Bird*, 60 *id.* 372; *Opera House Ass'n v. Bert*, 52 *id.* 471. (But where there is a breach of a covenant which cannot subsequently be performed, no notice is necessary. *Kelly v. Teague*, 63 *id.* 68.) So in Illinois, *Carson v. Crigler*, 9 Bradw. 83; and see *Hubner v. Feige*, 90 Ill. 208; and in Missouri, *Kaulleen v. Tillman*, 69 Mo. 510; and in Florida, *Greeley v. Spratt*, 19 Fla. 644; *McLean v. Same*, 20 *id.* 515;

§ 787. **Acts to Constitute Forcible Entry and Detainer.**—To make an entry forcible, there must be such acts of violence used, or such threats, menaces, or gestures exhibited, as give reason to apprehend personal injury or danger in standing in defence of the possession. If there is no other force made use of than is necessarily implied in every mere trespass, with nothing to excite a fear of personal danger, the case is not within the statute; and therefore the breaking of the lock of an outer door is not in itself sufficient to sustain a complaint of this description.¹ The same circumstances of violence or and in Texas, *Texas Land Co. v. Turman*, 53 Tex. 619; and in Nebraska, *Uhl v. Pence*, 11 Neb. 316. See *Hawley v. Robeson*, 14 *id.* 435. But in Arkansas the action will not lie on the right of possession merely, but the relation of landlord and tenant must subsist: *Dortch v. Robinson*, 31 Ark. 296; and the rule was applied against a mortgagee entitled to possession: *Necklace v. West*, 33 *id.* 682. The same rule prevails, *semble*, in Oregon. *Harrington v. Watson*, 11 Oregon, 143.

¹ *Willard v. Warren*, 17 Wend. 257, where the doctrine of forcible entry is elaborately discussed by Judge Cowen; *Rex v. Storr*, 3 Burr. 1702; *Pennsylvania v. Robison*, Addis. 14; *Commonwealth v. Dudley*, 10 Mass. 403; *Same v. Shattuck*, 4 *Cush.* 143; *Pike v. Witt*, 104 Mass. 595, where defendant entered through a hole in the floor; *Rex v. Wilson*, 8 T. R. 357; *Hawkins v. Hamilton*, 7 Hals. 203; *Berry v. Williams*, 1 Zab. 423. Proceedings under these acts should be discouraged unless the party charged has been guilty of an evident force. *Respublica v. Devore*, 1 Yeates, 501. To constitute a forcible entry or a forcible detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons and *show* of force as is calculated to deter the rightful owner from sending such persons away, and resuming his own possession. *Milner v. McClean*, 2 C. & P. 17. So an indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least such show of force as is calculated to prevent any resistance. *Rex v. Smyth*, 5 C. & P. 201. Where four men entered a building occupied by another, at night, and avowed their intention to keep possession, it was held to be sufficient evidence of force. *Scarlet v. Lamarque*, 5 Cal. 63. So of breaking into a house in the absence of the possessor. *Mason v. Powell*, 9 Vroom, 576. But the necessity of actual force has been much modified both by the language of statutes and the interpretation of courts. Thus, in Illinois, entry by force, mentioned and prohibited in the statute, has been held to mean merely entry without consent: *Croff v. Ballinger*, 18 Ill. 200; *Smith v. Hoag*, 45 *id.* 250; or a clandestine entry: *Baker v. Hays*, 28 *id.* 387; or an entry by collusion with the lessee: *McCartney v. Hunt*, 16 *id.* 76. So in Michigan, an “entry by stealth or stratagem” has been

terror which make an entry forcible will make a detainer forcible also; there must be proof of menaces or threats, or of such circumstances as tend to excite fear or apprehension of danger,¹ and, therefore, whoever keeps in the house an unusual number of people, or weapons for the purpose of intimidation, or threatens to do some bodily hurt to the former possessor if he dare return, will be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.² But the mere act of nailing up the door of a house does not amount to retaining forcible possession of it.³ Any person, however, claiming to have a right of entry into lands may freely exercise that right, provided he commits no such acts of violence as will subject him to a criminal prosecution.⁴ For this reason, a warrant will not lie for forcibly taking possession of a ferry, with the adjacent banks and shores of the river, where the party taking possession has a right of ferry established; for a ferry is an incorporeal right, upon which no forcible entry can in fact be made; nor can the sheriff, in case of a judgment of restitution, deliver possession

held within the statute against "force;" *Lutz v. Miles*, 16 Mich. 456. But a stricter rule seems to have been since applied, and violence or such an exhibition of force as inspires terror is not requisite. *Shaw v. Hoffman*, 21 *id.* 151; *s. c.* 25 *id.* 102. In Missouri, an entry "against the will of the occupant" has been held to be forcible: *Dennison v. Smith*, 26 Mo. 487; and the same is the rule in Kentucky and California by statute: Kentucky Code, § 500; act of April 2, 1866, § 3; *Meecham v. M'Kay*, 37 Cal. 154. On the other hand, it is held in Connecticut that actual force is requisite, and cannot be implied. *Gray v. Finch*, 23 Conn. 495.

¹ *Hendrickson v. Hendrickson*, 7 Halst. 202; *Hawkins v. Hamilton*, *supra*.

² *The People v. Rickert*, 8 Cow. 226; *Commonwealth v. Dudley*, *supra*. When the entry is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offence committed is a forcible entry and detainer. But when the original entry is lawful and the subsequent holding forcible and tortious, the offence is an unlawful detainer. Where the defendant entered peaceably under a lease, but kept forcible possession after the expiration of the lease, he was held guilty of forcible entry and detainer. *Pullen v. Boney*, 1 South, 125.

³ *Hopkins v. Buck*, 3 A. K. Marsh. 110.

⁴ *Langdon v. Potter*, 3 Mass. 215; *State v. Johnson*, 1 Dev. & B. 324. *The People v. Smith*, 24 Barb. 16; and see *ante*, § 524, note.

of a ferry.¹ Nor does it lie for forcibly entering upon a weir or fishery which is mere personal property.² But it is no excuse that the accused entered upon the premises to make a distress, or to enforce a lawful claim; nor that he was already in the house, or that, having entered by force, possession was ultimately obtained by entreaty.³ The offence may also be committed by a lessee who forcibly maintains possession when his term has expired; by a mortgagor, after the forfeiture of the mortgage in cases where the common-law doctrine of mortgage prevails;⁴ by the *feoffee* of a disseisor, after entry or claim of the party disseised; or by a tenant when he forcibly resists a distress for rent.⁵

§ 788. **Entry by force, when justified.**—If the tenancy of a house has terminated, and the tenant has promised to leave on a particular day, but does not, the landlord is not justified under the statute in putting him out by force; but if, the tenancy being ended, the tenant has left the house with his family and furniture, and locked it up, the landlord may break in and obtain possession, without violating the statute.⁶ If, however, after the expiration of the term, the tenant remains in possession of only a single apartment of the house; or if, after notice to quit, he abandons the house and locks it up, leaving some articles of furniture in it, the landlord is not justified, in either case, forcibly to assert his right of possession, and if he attempts to do so, will render himself liable to an

¹ *Rees v. Lawless*, 6 Litt. 184.

² *Van Arken v. Decker*, Paine, 108.

³ Com. Dig. Forcible Entry, A. 2; 8 T. R. 361.

⁴ But not until the mortgagee has acquired an actual possession. *Boyle v. Boyle*, 121 Mass. 85.

⁵ Com. Dig. Justices, B. 1. In those States where this remedy is confined to controversies between landlord and tenant, it is necessary that this relation shall appear in some form on the warrant. *Powers v. Sutherland*, 1 Duval, 151; *Goldsberry v. Bishop*, 2 *id.* 143; *Dunne v. Trustees*, 39 Ill. 578; *Bennett v. Montgomery*, 3 Halst. 48.

⁶ *Hillary v. Gay*, 6 C. & P. 284. But not if he is only temporarily absent. *Mason v. Powell*, 38 N. J. 576. The former case is correct so far as this process is concerned, though wholly untenable in sanctioning an action of trespass. See *ante*, §§ 523, 531, 532, 706.

indictment for a forcible entry.¹ And the representative character, with which a person happens to be clothed, will not shield him from the consequences of his forcible acts; as if the trustees of a church, who are, *virtute officii*, lawfully seised of the ground and buildings belonging thereto, close its doors against the minister and congregation, who break and enter the church by force, an indictment, or proceeding, for a forcible entry, at the instance of the trustees, will lie against them for the forcible entry. Having the key of the church is *prima facie* evidence of possession, but does not preclude an inquiry as to who are the legal trustees, and have the right of possession.²

§ 789. Who may maintain the Action.—By the New York statute, the complaint may be made by any person having an estate of freehold, or for a term for years, in the premises then subsisting, or some other right to the possession thereof, stating the same. The construction given to the English statutes on this subject narrowed the remedy to cases where the relator was seised of an estate of freehold or for a term of years,³ and the consequence was, that in every other instance of a forcible entry or detainer, so far as this remedy was concerned, the wrong-doer, although he entered by force and without right, was preferred to the quiet occupant thus dispossessed; for if the former could show on the traverse that the latter had no estate within the purview of these acts, as thus construed by the courts, he was entitled to a verdict. But it will be perceived our statute extends the remedy to any other right of possession; under which it has been held that, any person in the actual and peaceable possession of lands, at the time of a forcible entry, or in the constructive possession at the time of a forcible holding out, is entitled to proceed

¹ *Newton v. Harland*, 1 M. & G. 644; *Dorrell v. Johnson*, 17 Pick. 263; *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158. See *Hillary v. Gay*, *supra*.

² *People v. Runkle*, 9 Johns. 147; s. c. 8 *id.* 464. When a church or other corporation institutes a proceeding of this character, it must be in the corporate name, and not in the individual names of the trustees. *People v. Fulton*, 11 N. Y. 94.

³ 1 Hawk. P. C. C. 64, note; *ante*, § 786, note.

under the statute, although he is neither seised of a freehold, nor possessed of a term of years in the premises.¹ But unless there is possession in another at the time of entry, whatever be the degree of force, the entry is not an offence of the character of which we are treating.² A person, however, may have had possession constructively, when he was never, in fact, upon the land; and whether he had such possession or not is always a question for the jury.³ But a mere trespasser, or intruder upon the premises, cannot institute proceedings under this statute, and be restored to the possession of that which he held unlawfully; for the legislature only intended to extend this remedy to such persons as have a lawful right of possession.⁴

¹ *People v. Van Nostrand*, 9 Wend. 50. This proceeding may be taken only by the person whose possession is invaded, and does not pass to his assignee, the object of the statute being to give a summary remedy to one who has been forcibly dispossessed, without reference to his title or to his right of possession. *Dudley v. Lee*, 39 Ill. R. 339.

² *Pennsylvania v. Waddle*, Addis. 43; *Same v. Lemmon*, *id.* 315; *Same v. Leach*, *id.* 355; *Mairs v. Sparks*, 2 South, 513. The possession of a tenant even at will is not the possession of the lessor, so as to enable him to maintain his proceeding against a third person for expelling the tenant. *Commonwealth v. Bigelow*, 3 Pick. 31; *Bennet v. Montgomery*, 3 Halst. 49; *McCartney v. Alderson*, 45 Mo. 35. And if the owner demises the premises after a forcible entry upon them, his tenant, and not he, must maintain this process. *Kite v. Tubbs*, 32 Cal. 332; *Polack v. Shafer*, 46 *id.* 270. But in Missouri it has been held in two recent cases that a landlord may maintain this process against a purchaser of his title for entering on the premises without the tenant's consent or even in his absence. *May v. Luckett*, 54 Mo. 437; *Kingman v. Abington*, 56 *id.* 46.

³ *Chiles v. Stephens*, 3 A. K. Marsh. 340; *Kaulleen v. Tillman*, 69 Mo. 510; *Carson v. Crigler*, 9 Bradw. (Ill.) 83. Thus when a sub-tenant quit, and delivered the key to tenant, who was about to move in, when the sub-tenant borrowed the key and gave it to the landlord, who took possession, it was held that the tenant could maintain forcible detainer against him. *Haupt v. Pittaluga*, 6 Bush, 493. But see *Russell v. Desplons*, 29 Ala. 308, where, however, the tenant of the plaintiff has been out of possession many years. Where a corporation is complainant, the proceedings must be in the corporate name, and not in the name of the individual trustees. 1 Kern. 94.

⁴ "A complainant is now entitled to restitution if he has any right to possession. A mere intruder or trespasser cannot institute proceedings, or be restored to a possession which he held unlawfully; but every person

§ 790. Allegations necessary in order to Maintain.—The complainant, in those States where the English statutes have been adopted, must therefore allege that he was seised in fee, for life, or for a term of years in the premises, or has some other right to the possession thereof, stating the same, that he was in the peaceable possession thereof, and that he was turned out of possession by strong hand, or held out in the same manner.¹ His interest must be truly stated, and if an under-

lawfully in possession and forcibly excluded from such possession is entitled to the benefit of the statute. An estate at will is an interest recognized by law, and is of value to the tenant; for though he holds during the pleasure of the lessor, yet when his estate is so determined, he is entitled to the emblements, and for the purpose of bringing an ejectment, is considered a tenant from year to year; and he may therefore maintain these proceedings.” Per Savage, C. J., in *People v. Reed*, 11 Wend. 157. But it is otherwise with a tenant strictly at will, or a mere licensee. *People v. Fields*, 1 Lans. 222. So the rule that actual possession is all that the complainant is required to show has been adopted in California. Comp. Laws, 1853, c. 36, § 9; Missouri Rev. Code, 1845, p. 517; *Reed v. Holland*, 11 Mo. 605; *Dennison v. Smith*, 26 *id.* 487; so in *Krevet v. Meyer*, 24 *id.* 107; *Beeler v. Cardwell*, 33 *id.* 84; “lawfully possessed,” was held to mean only “peacefully possessed,” and only a previous peaceable possession was required. *Prewitt v. Burnett*, 46 Mo. 372. In Iowa, Code, § 2362, *Langworthy v. Meyers*, 4 Iowa, 18, “possession in fact” is sufficient; while in Virginia, “possession sufficient to maintain trespass,” is alone requisite: *Olinger v. Shepherd*, 12 Gratt. 462. Such possession was held sufficiently proved *primâ facie* by evidence of title at a prior date. *Hale v. Wiggins*, 33 Conn. 101. But this doctrine of the sufficiency of mere possession seems to have been carried too far in some States, where it is held that the plaintiff may recover if in actual possession, no matter how acquired: *King v. St. Louis G. L. Co.*, 34 Mo. 34; or if he were a trespasser, and defendant the legal owner: *Lorimier v. Lewis, Morris*, 253. Thus, where the plaintiff entered without right upon the premises, and ploughed and sowed a part thereof, his possession was held *primâ facie* to extend to the whole estate; but if it were shown that he was a mere intruder, he was still entitled to maintain this process for the part actually occupied by him. *Hall v. Turner*, 46 Mo. 438. However sound this may be, the law is certainly otherwise where recovery is limited by statute to the party “entitled to the premises,” as in Massachusetts. Gen. Stat. p. 137, § 2; Indiana, 2 Gavin & H. Stat. p. 632, § 12. And the party recovering must show a possession acquired under claim of title, even if invalid.

¹ 1 Hawk. P. C. 274; *Commonwealth v. Dudley*, 10 Mass. 403; *People v. Runkle*, 8 Johns. 464; *Rex v. Wilson*, 8 T. R. 357. Constructive possession is not sufficient. *Boylston v. Valentine*, 1 Harr. 316.

tenant is disseised, he is the only person entitled to make the complaint.¹ A mere claim or right to the possession is not sufficient;² but if a lawful possession is averred, it is enough, unless a want of precision in the statement should be objected to previous to the taking of the inquisition before the judge. And since the enactment of the Revised Statutes in New York, it is no longer necessary in that State for the complainant to aver that he was seised of a freehold, or possessed of a term of years, for mere possession is sufficient.³ Accordingly, an affidavit that the complainant was lawfully and peaceably possessed of the premises in question, as tenant thereof, under the executors of A. B., deceased, who was the owner of the same, without setting forth the nature of the estate by virtue of which such possession was held, was deemed sufficient within the provisions of the statute, even upon an objection taken that the complainant was a mere tenant at will.⁴ It is of no importance whether the seisin be by right or by wrong, nor whether the term of years be legal or not;⁵ but a man who was neither in possession nor had title at the time the entry was made,

¹ *Yoder v. Easeley*, 2 Dana, 245; *Banks v. Murray*, 2 South, 849; *Wall v. Hunt*, 4 Halst. 37; *Barlow v. Burns*, 40 Cal. 351; *Baylesten v. Valentine*, 1 Halst. 347; *Phelps v. Baldwin*, 17 Conn. 209; *M'Cartney v. M'Mullen*, 38 Ill. 237; *Spurck v. Forsyth*, 40 *id.* 438. A lessor cannot maintain the proceeding for an unlawful entry upon the possession of his tenant. *Treat v. Stuart*, 5 Cal. 113. In *Jarvis v. Hamilton*, 16 Wisc. 574, *Spurck v. Forsyth*, *supra*, it was held sufficient actual possession that plaintiff, though he did not reside on the premises, owned and improved them; and that they furnished "visible tokens of occupancy, such as fences, buildings and cultivation." So possession of part of the premises, with a claim on the whole: *Hardisty v. Glenn*, 32 Ill. 62; or possession by keeping goods on the premises, were held sufficient: *Wall v. Goodenough*, 16 *id.* 417; *Baker v. Hayes*, 28 *id.* 387; while in *Warren v. Ritter*, 11 Mo. 354, the legal possession of a lessor after expiry of the lease, was held to suffice as against a mere intruder.

² *Mairs v. Sparks*, 2 South. 513.

³ *People v. Fields*, 1 Lans. 222. Technical nicety is not required in the statement of demand in unlawful detainer; it is sufficient if a substantial cause of action appears. *Houghton v. Potter*, 4 Zab. 735.

⁴ *People v. Reed*, 11 Wend. 157; *People v. Van Nostrand*, 9 Wend. 50. See Appendix, No. XXVI.

⁵ *People v. Leonard*, 11 Johns. 504; *State v. Pearson*, 2 N. H. 550; *Mairs v. Sparks*, 2 South. 513; *Republica v. Devore*, 1 Yeates, 501.

cannot by subsequent purchase acquire a right to institute this proceeding.¹ It is only necessary to set forth a general description of the land ;² but the description must be sufficient to afford a guide to the sheriff, in executing the writ of restitution.³

§ 791. Form of Proceeding.—The complaint must be in writing, accompanied by an affidavit of the facts which justify the proceeding ; but if the complaint sets forth such facts in addition to the complainant's right of possession, and is verified by an affidavit, no other affidavit is necessary. The complaint must be presented to any of the authorities authorized to issue process, to dispossess a tenant by summary proceedings. Thereupon the justice will issue a precept to the sheriff, or a constable, of the county, requiring him to summon a jury to inquire of the forcible entry or detainer ; and at the same time will notify the person against whom the complaint is made of the issuing of such precept, and of the time and place of the return thereof.⁴ The notice must be served by delivering it to the party complained of, or, if he cannot be found, to some person of proper age upon the premises ; or, if there be no such person, by affixing it upon the front door of the house, if there be one ; or, if not, then upon some other public and suitable place on the premises.⁵ At the time and place appointed for the return of the precept, the jury will make inquiry under oath, and deliver the same to the judge. And the magistrate has no authority to try the issue without a jury, although neither party should require it.⁶

¹ Lewis *v.* Stitle, 2 Litt. 294; Gray *v.* Gray, 3 *id.* 465. In New Jersey, the nature of the estate of the party aggrieved must be stated in the complaint. Wall *v.* Hunt, *supra*. But the defendant is not allowed to show that the complainant has a different estate in the premises from that which he avers in the complaint. Allen *v.* Smith, 7 Halst. 199. In Nebraska, one who has never been in possession of land, cannot maintain the action against the owner of the fee. Haller *v.* Blaco, 14 Neb. 195.

² Moore *v.* Massie, 5 Litt. 296.

³ Murphy *v.* Lucas, 2 Ohio, 255; Banks *v.* Murray, 2 South. 849.

⁴ For a precedent of the complaint and subsequent proceedings, see Appendix, No. XXVI.

⁵ 2 R. S. 508, § 4.

⁶ Benjamin *v.* Benjamin, 5 N. Y. 383. The Revised Statutes of New York do not appear to have repealed the act to prevent forcible entries and detainers;

The defendant is entitled to produce witnesses before the jury of inquiry, to cross-examine the complainant's witnesses, and to sum up the evidence to the jury.¹ The only questions to be tried at this stage of the proceeding are, the previous actual possession of the complainant, and the forcible character of obtaining or holding possession, and not the right of possession. The proof of the complainant's estate is to be made before the magistrate when the complaint is preferred, and the statute nowhere authorizes the jury to investigate the title, or the right of possession of either party.² If, by the inquisition, it shall be found that a forcible entry has been made, or that, the entry being peaceable, possession was forcibly kept; and the defendant does not traverse the inquisition within twenty-four hours after it is found, the officer must award restitution of the premises, assess the costs and expenses of the proceedings, and issue a precept to the constable, directing him to reinstate the complainant in his possession. But after the finding of such an inquest, the party complained against may traverse the inquisition in writing, denying such forcible entry, or forcible holding out, or al-

passed in 1788; by which any justice of the peace, upon complaint made to him of a forcible entry, is required to take with him sufficient power of the county, and go to the place where such force is made; and if he finds the place so forcibly held, after such entry made, to record such force, and there set a fine upon each of the offenders, and imprison him in the county jail until the fine is paid. But where a justice acts thus in his own view, without any inquisition by a jury, he can only punish the party guilty of the force, but cannot restore the possession; and if he orders or permits a restitution of possession, it is irregular. *Matter of Shotwell, 10 Johns. 304.*

¹ *People v. Reed, 9 Wend. 157; 2 R. S. 509.*

² *Carter v. Newbold, 7 How. Pr. R. 166. So Georges v. Hupfschmidt, 44 Mo. 179; Smith v. Meyers, 45 id. 434. In McCauley v. Weller, 12 Cal. 500, Terry, C. J., says, "This is a summary proceeding to recover the possession of premises forcibly seized or unlawfully detained. The inquiry is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by the defendant; the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions of title cannot arise; a forcible entry upon the actual possession of the plaintiff being shown, he is entitled to restitution, though the fee simple title and present right of possession are shown to be in the defendant."*

leging that he, or his ancestors, or those whose estate he has in such lands, have been in quiet possession for three years previous, and that his interest is not terminated; and upon paying the fees of the inquisition, the traverse will stay all further proceedings until it can be tried. The landlord of the party complained against may also become the traverser upon the same terms. A jury of twelve men is then summoned to try the traverse in the same manner as provided by law in civil actions before a justice of the peace. On the trial of the traverse, the party making the complaint will only be required to show, in addition to the forcible entry or detainer complained of, that he was in actual and peaceable possession at the time of the forcible entry, or was in the constructive possession of the premises at the time of the forcible holding out. And the only defences allowed to the traverser are a denial of the forcible entry or detainer; or that he, or his ancestor, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of three whole years together, next before the trial, and that his interest therein is not then ended or determined.¹

§ 792. Title, how far in Issue.—Possession Essential. — Although the title of the relator is not, in general, to be investigated in a proceeding of this nature, he is still bound to set forth his title so far as to show that the land he claims and the case he makes come within the provisions of the statute; and to this extent the title of the relator may be controverted by the defendant.² He must, however, show himself in the peaceable possession of the premises at the time of the alleged entry; and proof of title, with acts of ownership, such as the payment of taxes and the like, is not evidence of possession, without showing that such acts of ownership were also acts of possession. Proof of possession several years prior to the

¹ 2 R. S. 509, §§ 4-11; *People v. Leonard*, 11 Johns. 505; *Gray v. Nesbet*, 2 A. K. Marsh. 35; *Singleton v. Finley*, 1 Port. 144.

² *Pearson v. Herr*, 53 Ill. 144. The defendant is precluded from setting up that the complainant's title is not such as he has set forth in his complaint. *Applegate v. Applegate*, 1 Harr. 323; *Allen v. Smith*, 7 Halst. 199.

entry, as the existence of an old fence or wall which were then built by him, will not sustain the allegation of possession at the time of entry.¹ And if the evidence fails to show force and violence, or any attempt at intimidation on the part of the intruder at the time of his entry upon the premises, the plaintiff does not present such a case as entitles him to the remedy provided by the statute. For the proceeding is not applicable to the case of a peaceful entry by the defendant under color of title in himself, or as tenant of some person other than the plaintiff or his assignor.² The defendant cannot set up his own title as a substantive matter of defence, and if he considers his claim to be paramount to that of the relator, he must resort to the remedy of ejectment to maintain his rights.³ In a case before referred to, arising under the New York statute, it was objected by the defendant that, as the indictment alleged a possession in fee simple in the relator, the complainant was bound to show such an estate on the trial; but the court held that the nature of the estate was quite immaterial; that possession was sufficient, and that any allegation of the estate, in addition to possession, might be rejected as surplusage, or was sufficiently proved by evidence of possession.⁴

¹ *McCartney v. Alderson*, 45 Mo. 35; *Hassett v. Johnson*, 48 Ill. 68; and see *Smith v. Hollenback*, 51 *id.*; *Mairs v. Sparks*, 2 South. 513.

² *Buel v. Frazier*, 38 Cal. 693; *Winterfield v. Stauss*, 24 Wisc. 394. A plaint which claims the whole house is not sustained by evidence that the plaintiff was possessed of only part of the house upon which a forcible entry was made. *House v. Wilder*, 47 Ill. 510. And if there are two defendants both must be found guilty, or neither, and there cannot be a verdict of guilty as to one, and not guilty as to another. *Snedeker v. Quick*, 7 Halst. 129; *Hildebrand v. Linninger*, 3 Green, 38.

³ *People v. Rickert*, 8 Cow. 226; *People v. Godfrey*, 1 Hall, 240; *People v. Nelson*, 13 Johns. 40; *Respublica v. Shryber*, 1 Dall. 68; *Chiles v. Stephens*, 3 A. K. Marsh. 344; *Dutton v. Tracy*, 4 Conn. 79; *Lecatt v. Stewart*, 2 Stew. 474. See *ante*, § 728 *a*, note, § 8, cases and statutes cited as to how far title is in issue in this proceeding. In *White v. Bailey*, 14 Conn. 271, a lessor who had assigned was held entitled to recover in this process, notwithstanding the assignment.

⁴ *People v. Van Nostrand*, 9 Wend. 50. The court here say: "It is objected by the defendant, that, as the indictment alleges a possession in fee simple in the relator, the complainant was bound to show such an estate on the trial. Under the Revised Statutes, the nature of the estate has

§ 793. **Judgment for Restitution.** — If the defendant is found guilty upon the traverse, the judge will award restitution of the premises which have been forcibly entered or forcibly held out, with the costs and expenses of the proceeding ; and the sheriff or constable is thereupon directed to cause the complainant to be restored to and put in full possession of the premises.¹ The proceedings for a restitution of the premises must be accurately recorded by the justice, and may be removed by *certiorari*, when allowed by a justice of the Supreme Court, after an inquisition found,² and upon giving a bond with sureties to the complainant, to abide by the final order of the court, and to pay any costs that may be awarded.³ And where the proceedings have been so removed, and the issue ordered to be tried at the circuit, judgment as in case of nonsuit will be granted, as in other actions, if the relator does not proceed to trial.⁴ These proceedings may be quashed on motion founded on affidavits, for irregularity, and a re-restitution awarded ;⁵ and it is not too late to make the motion after the inquisition has been traversed by the defendant.⁶ They

become immaterial; possession is sufficient; and I apprehend the allegation of the estate, in addition to the possession, may be rejected as surplusage. But if it was necessary to establish the fact, as alleged in the indictment, the proof of possession was evidence of it, 11 Johns. 510, and the defendant is not at liberty to rebut the inference drawn from such evidence, by showing the kind of estate which the complainant has in the premises." The only defence allowed to the defendant on the traverse is, 1st. The denial of the forcible entry or forcible holding out; or, 2d. Showing that he, or his ancestors, or those whose estate he has, have been in the quiet possession of the premises *three whole years together*, next before the inquisition found, and *that his interest is not ended or determined*. And the court refused to permit the defendant to traverse the complainant's title. See *People v. Godfrey*, 1 Hall, 240; *People v. Nelson*, 13 Johns. 340.

¹ 2 R. S. 509, §§ 12, 13. The statutes of Illinois and Indiana require that all the jury should sign the verdict. *Bloom v. Goodner*, Breese, 35; *Test v. Devers*, 2 Blackf. 80. The right to restitution is a civil right, and when a three years' prior possession is pleaded, it is no bar to the inquisition, but is a good plea to prevent restitution. *State v. Covenhoven*, 1 Halst. 396.

² *Haines v. Backus*, 4 Wend. 213.

³ 2 R. S. 511, § 20.

⁴ *People v. Hickox*, 3 Hill, 446.

⁵ *Matter of Shotwell*, 10 Johns. 304; 13 id. 158.

⁶ *People v. Wilson*, 13 How. Pr. R. 446.

may also be quashed for the same reason, when brought before the court on *certiorari*.¹ The unsuccessful party, upon the *certiorari*, may appeal to the Court of Appeals; and the proceedings, as well as the award of costs, are regulated by the Code of Procedure, and are substantially the same as on appeals from judgments in civil actions.² But the judgment in this proceeding, whenever obtained, is in no respect conclusive in regard to the title; it determines only the right to the possession.³ In addition to the remedies above stated, an action of trespass may also be maintained by the party ejected or kept out; and if successful, the statute provides that he shall recover treble the damages assessed by the jury, or by a justice of the peace, in cases provided by law. And in such an action it is not necessary to show that the defendant has been convicted under the statute of forcible entry and detainer.⁴

§ 794. **Indictment for, when supported.** — An indictment may also be supported at common law for a forcible entry or detainer; but to justify an indictment, the entry must appear to have been accompanied by a public breach of the peace.⁵ To an indictment, the defendant has been allowed to plead three years' possession; or he may traverse the force:⁶ and

¹ *People v. Smith*, 24 Barb. 16.

² Code of Procedure, § 11; *Hyatt v. Seeley*, 11 N. Y. 52; *id.* 94; *id.* 276; *People v. Sturtevant*, 3 Duer, 616.

³ *Harvie v. Turner*, 46 Mo. 444. It is held that reletting to the defendant after judgment in forcible entry and detainer satisfies the judgment. *Barney v. Cain*, 37 Ark. 127.

⁴ *Willard v. Warren*, 17 Wend. 257. In such an action the defendant would be entitled to a verdict if he shows title in himself, however punishable he may be criminally for the force used. *Id.*

⁵ *Rex v. Nichols*, 1 Kenyon, 512; *Rex v. Wilson*, 8 T. R. 360; *Rex v. Lloyd*, Cald. 415; *Commonwealth v. Shattuck*, 4 Cush. 141.

⁶ *Rex v. Harris*, 1 Ld. Ray. 440. The indictment must set forth a seisin or possession within the purview of the act, and whether the estate of the testator be a freehold or a term of years; and on the traverse, the allegations as to his estate must be proved by the prosecutor. *People v. Nelson*, 13 Johns. 340. It will be sufficient to state the injury with such certainty as will enable the court to award restitution; and any variance not essential in the name of a person, or in the description of the corporation injured, will not vitiate the proceedings. *People v. Runkle*, 9 Johns. 147.

although he cannot justify the force by showing title in himself, he may controvert the facts by which the prosecutor attempts to show his title, for the purpose of proving that the prosecutor has not such an estate as would entitle him to maintain a complaint under the statute.¹ Upon a conviction of the prisoner for either a forcible entry, or detainer, the court will not only punish the offender by fine or imprisonment, under the statute, but will also award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him.²

¹ People *v.* Rickert, 8 Cow. 226; People *v.* Nelson, 13 Johns. 340; People *v.* Van Nostrand, 9 Wend. 50. In People *v.* Nelson, the defendant offered, but was not allowed, to prove that he purchased the premises at a sheriff's sale, on an execution against the prosecutor, and that his entry was on that title.

² 2 R. S. 511, § 23; Hawk. b. 1, c. 64, § 45; Ford's Case, Cro. Jac. 151; Simmons' Case, Aleyn, 50; People *v.* Anthony, 4 Johns. 198; People *v.* Rickert, *supra*.

APPENDIX.

NO. I.

Agreement for a Lease.

Memorandum of an agreement made the —— day of ——, 18—, between A. B. [*intended lessor*], of ——, of the one part ; and C. D. [*intended lessee*], of ——, of the other part.

The said A. B. agrees to grant, and the said C. D. to take, a lease, by indenture, of all that messuage, &c.,¹ with the appurtenances, for the term of —— years, to commence and be computed from the —— day of —— last, at the yearly rent of ——, to be paid half yearly, on the —— day of ——, and the —— day of ——, without any deduction or abatement on any account whatsoever ; the first half-yearly payment thereof to become due and be made on the —— day of —— next. And it is hereby declared and agreed that in such lease, when made, shall be contained the following covenants, that is to say : [Here set out the covenants intended to be comprised in the lease.]²

Witness,

A. B.

C. D.

Parcels.
Term.

Rent.

Lease to
contain
covenants.

¹ The words "messuage," or "tenement," or "premises," are used throughout these forms ; but it is unnecessary to say that the parcels, varying as they must do, should be referred to by appropriate terms. When once described they may, in general, be referred to by the single word "premises."

² In framing agreements for leases, the best plan is to set out *in extenso* the several provisions which the lease itself is to contain ; but as this is often objected to on the ground of expense, the provisions are sometimes referred to in concise terms (as, the lessee to covenant to pay rent and taxes, to repair, to insure, &c.), and left to expansion at a future day, according to the supposed intention of the parties ;

NO. II.

Terms for Letting a Farm.

Terms of an agreement between A. B. and C. D. for letting a farm in the town of —, in the county of Somerset, in the State of New Jersey, known as the Bellevue Farm.

Term. 1. Term to be five years, to be computed from the — day of —, and so to continue until the landlord, or his agent, or the tenant, shall give six calendar months' notice, in writing, to the other to determine the tenancy on the — day of — next following the day of the date of such notice.

Rent. 2. Rent to be \$— per annum, to commence on the — day of — next, and to be paid quarterly on the — day of —, the — day of —, the — day of —, and the — day of —, and to be paid by equal portions; the first payment thereof to be made on the — day of — next.

Reserva-
tions. 3. The landlord reserves to himself all trees, woods, underwoods, and saplings, with liberty, at all seasonable times, of ingress, egress, and regress, for himself or servants, agents, and workmen, with or without horses and carriages, on any and every part of the premises, for the purpose of cutting down and carrying away the same, and also to view the state of repair of the said premises, and perform all reparations necessary, and on all other just and reasonable occasions. He also reserves to himself and his friends, either in his company or not, the right of sporting over the said premises.

Taxes and
rates. 4. The tenant to pay and discharge all rates, taxes, and assessments of every description, as well what are chargeable on the landlord as on the tenant, now charged, or hereafter during the time of his occupation to be charged

a course of proceeding generally leading to dispute, and not infrequently to litigation; and for this reason an agreement stipulating for the insertion of *all usual covenants*, or *all proper covenants*, or the like, should be avoided; as it may be uncertain what are usual or proper covenants.

on the premises, except the landlord's property tax payable in respect of the premises.

5. The tenant not to plough or convert to tillage any part of the premises now in meadow or pasture, without the consent, in writing, of the landlord or his agent; nor sow or plant flax, rape, hemp, or tobacco, upon any part of the said premises, under an additional sum, at the rate of — per acre per annum, to be payable quarterly, on the days aforesaid, and to be considered as rent; and payment thereof to be enforceable accordingly.

6. The tenant not at any time between the first day of November and the first day of April to depasture or feed more than two horses, mares, or geldings, in any one close, at any one time, after giving or receiving notice to quit the same.

7. The landlord to keep in repair the roofs, walls, beams, and stanchions of the dwelling-house and out-houses belonging to the said premises.

8. The tenant not to sell or part with any dung or compost to be made on the premises, nor any hay, straw, halm, or stubble, or the fodder that shall arise therefrom; but shall spend and consume the same on the premises.

9. The tenant not to let or in any manner otherwise dispose of, or permit to be occupied by any other person, any part of the premises, without the landlord's consent, in writing, under the additional yearly rent of — per acre for each acre so let, disposed of, or permitted to be occupied, and so in proportion for any greater or less quantity than an acre; such additional rent to be payable quarterly on the days aforesaid, and considered as rent, and payment thereof to be enforceable accordingly.

10. The tenant to keep in repair the glass of the windows of the dwelling-house, and all internal repairs and painting; and also find and provide all gates, posts, stiles, rails, pales, and backings, and keep the same in good tenantable repair; and also new-make and repair all the hedges, wall and other fences, and cleanse the ditches, watercourses, and drains, in and upon the said premises.

11. The tenant not to mow any part of the meadow-lands more than once in any one year, or after the tenth day of August in every year; and in all respects to

Penal rents.

Depasturing horses, &c.

Repairs of roofs, &c.

Dung, or compost.

Assigning or under-letting.

Penal rent.

Repairs of windows, &c.

Mowing and cultivation.

manage and cultivate all the premises in a husbandlike manner.

Waste. 12. The tenant to pay —, as stated damage, for any waste or damage done, or permitted on the premises, to the amount of five dollars, and so in proportion for any greater or less damage ; and also —, as stated damages, for each and every tree or sapling that shall be cut on the premises.

**Bankruptcy
or insolvency
of tenant.** 13. The landlord to have and take immediate possession of the premises, in case the tenant shall become a bankrupt, or in case he shall take the benefit of any act for the relief of insolvent debtors, or shall permit any writ of execution to be levied on his effects.

**Construction
of agree-
ment.** 14. This instrument to operate as an agreement for a lease and not as a lease.

Lien. 15. A. B., of — [*the landlord*], and C. D., of — [*the tenant*], hereby mutually agree, each of them for himself, his heirs, executors, administrators, and assigns, with the other of them, his heirs, executors, administrators, and assigns, that the said A. B. and C. D. respectively, and his respective heirs, executors, administrators, and assigns, shall and will, from time to time, during the continuance of the term or estate agreed to be granted, as above mentioned, make the payments, and observe, perform, and fulfil all the articles and stipulations above mentioned, to be observed and performed on his and their parts respectively.

In witness whereof, the said parties to these presents have hereunto set their hands the — day of —, one thousand eight hundred and —.

Witness,

A. B.

C. D.

NO. III.

Another Form of an Agreement for a Lease.

**Parties
agree to
execute a
lease.**

Memorandum of an agreement entered into this first day of February, 1844, between A. B., of the city of New York, Esquire, and C. D., of the said city, merchant, whereby the said A. B. agrees that he will, by an indenture, to be exe-

Specification
of covenants
to be con-
tained in the
lease.

cuted on or before the first day of May next, demise and let to the said C. D. a certain house and lot in said city, now or late in the occupation of E. F., known as No. —, in — street, to hold to the said C. D., his executors, administrators, and assigns, from the first day of May aforesaid, for and during the term of twenty-one years, at or under the clear yearly rent of five hundred dollars, payable quarterly, clear of all taxes and deductions except the ground-rent. In which lease there shall be contained covenants on the part of the said C. D., his executors, administrators, and assigns, to pay the rent (except in case the premises are destroyed by fire, the rent is to cease until they are rebuilt by the said A. B.), and to pay all taxes and assessments (except the ground-rent), to repair the premises (except damages by fire), not to carry on any offensive or other business on the premises (except by written permission of the said A. B.), to deliver up the same at the end of the term in good repair (except dangers by fire as aforesaid), with all other usual and reasonable covenants, and a proviso for the re-entry of the said C. D., his heirs and assigns, in case of the non-payment of the rent for the space of fifteen days after either of the said rent-days, or the non-performance of any of the covenants. And there shall also be contained covenants on the part of the said A. B., his heirs, and assigns, for quiet enjoyment; to renew said lease at the expiration of said term, for a further period of twenty-one years, at the same rent, on the said C. D., his executors, administrators, or assigns, paying the said A. B., his executors, administrators, or assigns, the sum of five hundred dollars, as a premium for such renewal; and that, in case of an accidental fire at any time during the term, the said A. B. will forthwith proceed to put the premises in as good repair as before such fire, the rent in the meantime to cease. And the said C. D. hereby agrees to accept such lease, on the terms aforesaid. And it is mutually agreed that the cost of this agreement, and of making and recording said lease and a counterpart thereof, shall be borne by the said parties equally.

As witness our hands and seals the day and year first above written.

A. B. (L. s.)

C. D. (L. s.)

NO. IV.

A short Lease, on the part of the Landlord.

This is to certify that I have, this first day of March, 1844, let and rented unto Mr. C. D. my house and lot, known as No. —, in — street, in the city of New York, with the appurtenances, and the sole and uninterrupted use and occupation thereof, for one year, to commence on the first day of May next, at the yearly rent of four hundred dollars, payable quarterly, on the usual quarter-days; rent to cease in case the premises are destroyed by fire.

A. B.

Tenant's Acceptance.

This is to certify that I have hired and taken from Mr. A. B. his house and lot, known as No. —, in — street, in the city of New York, with the appurtenances, for the term of one year, to commence on the first day of May next, at the yearly rent of four hundred dollars, payable quarterly, on the usual quarter-days. And I do hereby promise to make punctual payment of the rent in manner aforesaid, except in case the premises become untenantable from fire, or any other cause, when the rent is to cease; and do further promise to quit and surrender the premises, at the expiration of the term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

Given under my hand and seal the first day of March, 1844.

Witness,

C. D. (L. s.)

Security for Rent.

In consideration of the letting of the premises as above described, and of the sum of one dollar to be paid by —, the lessor, I do hereby covenant and agree to and with the said — and his legal representatives, that if default shall at any time be made by —, the said lessee, in the payment of the rent, or the performance of the covenants above contained, that I will well and truly pay the

said rent, or any arrears thereof, that may remain due unto the said —, or his legal representatives, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default to be given to me.

Given under my hand and seal this — day of —, 18—.

Witness,

E. F. (L. S.)

NO. V.

Tenant's Agreement for a House, Embracing a Mortgage of his Chattels.¹

This is to certify that I, A. B., have hired and taken from C. D. the premises known as No. —, in — street, in the city of New York, for the term of one year from the first day of May next, at the yearly rent of four hundred dollars, payable quarterly. And I hereby promise to make punctual payment of the rent in manner aforesaid, and quit and surrender the premises at the expiration of said term, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted; and engage not to let or underlet the whole or any part of the said premises, or occupy the same for any business deemed extra-hazardous on account of fire, without the written consent of the landlord, under the penalty of forfeiture and damages. And I do hereby mortgage and pledge all the personal property, of what kind soever, which I shall at any time have on the said premises, whether exempt by law from distress for rent, or sale under execution, or not, to the faithful performance of these covenants, hereby authorizing the said C. D., or his assigns, to enter upon the said premises, and take and

¹ A provision in a lease, whereby the lessee mortgages all his chattels upon the demised premises, as security for the rent, has been held to be good in New York, although an inventory of them is not made and annexed at the time of the execution of the lease; and see *Harding v. Coburn*, 12 Met. 333; but probably would not be supported in respect to such property as should be thereafter brought upon the premises, as being contrary to the policy of the Act to abolish distress for rent; see also *Jones v. Richardson*, 10 Met. 481.

remove the said goods and sell the same at public auction for the payment of the amount that may then be due, with the expenses of such sale, in case of any failure on my part to perform the said covenants, or any or either of them.

Given under my hand and seal the fifteenth day of March, 1844.

A. B. (L. S.)

Landlord's Agreement.

This is to certify that I, C. D., have let and rented unto A. B. the premises known as No. —, in — street, in the city of New York, for the term of one year from the first day of May next, at the yearly rent of four hundred dollars, payable quarterly. The premises are not to be used or occupied for any business deemed extra-hazardous on account of fire, nor shall the same, or any part thereof, be let or underlet, except with the consent of the landlord, in writing, under the penalty of forfeiture and damages.

Given under my hand and seal the fifteenth day of March, 1844.

C. D.

NO. VI.

Agreement for Lodgings or Part of a House.

Memorandum of an agreement entered into the — day of —, 1844, by and between A. B., of —, and C. D., of, &c., whereby the said A. B. agrees to let, and the said C. D. agrees to take, the rooms or apartments following: that is to say, an entire first floor, and one room in the attic story, or garret, and a back kitchen and cellar opposite, with the use of the yard for drying linen or beating carpets or clothes, being part of a house and premises, in which the said A. B. now resides, situate and being in number —, in — street, in the city of New York, to have and to hold the said rooms and apartments, and the use of the said yard as aforesaid, for and during the term of half a year, to commence from the — day of — instant, at and for the yearly rent of — dollars, lawful

money of the United States, payable monthly, by even and equal portions, the first payment to be made on the —— day of —— next ensuing the date thereof; and it is further agreed that, at the expiration of the said term of half a year, the said C. D. may hold, occupy, or enjoy the said rooms or apartments, and have the use of the said yard as aforesaid, from month to month, for so long a time as the said C. D. and A. B. may and shall agree, at the rent above specified; and that each party be at liberty to quit possession on giving the other a month's notice in writing. And it is also further agreed that, when the said C. D. shall quit the premises, he shall leave them in as good condition and repair as they shall be on his taking possession thereof, reasonable wear excepted.

As witness our respective hands and seals the day and year aforesaid.

Witness present,

A. B. (L. s.)

C. D. (L. s.)

NO. VII.

An Agreement of Lease.

This agreement, made the first day of February, in the year one thousand eight hundred and sixty-six, between A. B., of the city of Brooklyn, of the first part, and C. D., of said city, of the second part, witnesseth, that the said party of the first part hath agreed to let, and hereby doth let, to the said party of the second part, and the said party of the second part hath agreed to take, and hereby doth take, from the said party of the first part, the house and lot known as No. —, in — street, in the said city, for the term of three years, to commence on the first day of May, 1866, and to end on the thirtieth day of April, 1869; and the said party of the second part hereby covenants and agrees to pay unto the said party of the first part, the annual rent or sum of — dollars, payable quarterly in advance, on the usual quarter-days, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for

Term.

Covenant to
pay rent.

Water-rate. the Croton water, on or before the first day of August in each year during the term, and if not so paid, the same shall be added to and become part of the rent then due ; and to quit and surrender the premises, at the expiration of the said term, in as good state and condition as they were in at the commencement of the term, reasonable use and wear thereof and damages by the elements excepted ; and that he will not assign this lease, nor let, or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said party of the first part, under the penalty of forfeiture and damages ; and that he will not occupy or use the said premises, nor permit the same to be occupied or used for any business deemed extra-hazardous on account of fire or otherwise, without the like consent, under the like penalty ; and that he will permit the said party of the first part, or his agent, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, will permit the usual notice of "to let," or "for sale," to be placed upon the walls or doors of said premises, and remain thereon without hindrance or molestation. And also, that if the said premises, or any part thereof, shall become vacant during the said term, the said party of the first part, or his representative, may re-enter the same, either by force or otherwise without being liable to any prosecution therefor ; and re-let the said premises as the agent of the said party of the second part, and receive the rent thereof, applying the same, first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due by these presents ; and the balance (if any) to be paid over to the said party of the second part, who shall remain liable for any deficiency. And the said party of the second part hereby further covenants that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring, and the relation of landlord and tenant, shall, at the option of the said party of the first part, wholly cease and determine ; and the said party of the first part shall and may re-enter the said premises, and remove all persons therefrom ; and the said party of

To surrender premises.

Not to assign, nor make alterations.

Extra hazardous occupation.

Permit persons to view premises.

Re-entry for vacancy, and to re-let.

Proviso for re-entry;

the second part hereby expressly waives the service of any notice in writing of intention to re-enter. And it is further agreed between the parties to these presents that in case the premises above mentioned shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the said landlord; that in case the damage shall be so extensive as to render the premises untenantable, the rent shall cease until such time as the same shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this agreement shall, at the option of the said tenant, cease and come to an end; provided, however, that such damage or destruction shall not have been caused by the carelessness, negligence, or improper conduct of the party of the second part, his agents or servants. And the said party of the first part hereby covenants that the said party of the second part, on paying the said yearly rents, and performing the covenants aforesaid, shall, and may, peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid. And it is further understood and agreed, that the covenants and agreements contained in the within lease shall be binding upon the parties hereto, their legal representatives and assigns.

*for repair in
case of fire;*

*for quiet
enjoyment;*

*to bind the
representa-
tive of each
party.*

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of

NO. VIII.

A Lease of a House for Five Years.

This indenture, made on the first day of April, one thousand eight hundred and forty-four, between A. B., of the city of New York, merchant, of the first part, and C. D., of said city, bookseller, of the second part, witnesseth, that the said party of the first part hath letten, and by these

Parties

grant and
demise.

For the term
of five years.

Proviso for
re-entry.

Lessor cove-
*nants to pay
rent;*

to keep the
premises in
repair;

to surrender
at the end of
the term;

and to pay
taxes, &c.

Lessor cove-
*nants for
quiet enjoy-*
ment;

presents doth grant, demise, and to farm let, unto the said party of the second part, his executors, administrators, and assigns, all that brick house, messuage, or tenement, with all and singular its appurtenances, situate, standing, and being in the ninth ward of the said city of New York, and known as No. —, in — street, in said city, to have and to hold the said premises, with the appurtenances, unto the said C. D., his executors, administrators, and assigns, for the term of five years, from the first day of May, one thousand eight hundred and forty-four, at the yearly rent or sum of six hundred dollars, to be paid in equal quarter-yearly payments, as long as the said premises are in good tenantable condition. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, to *re-enter* the said premises, or to distrain for any rent that may remain due thereon. And the said party of the second part doth hereby covenant to pay to the said party of the first part the said yearly rent, as herein specified, save and except at all times during the said term such proportional part of the said *yearly rent* as shall grow due during such time as the house shall, without the hindrance of the said party of the second part, be and remain untenantable by reason of accidental fire. And that the said C. D., his executors, administrators, and assigns, shall and will during the said term, at his own proper cost and charges, well and sufficiently *keep in repair* the said demised premises, with their appurtenances, when and as often as the same shall require, damages by fire only excepted. And that, at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by fire only excepted. And also that he, the said party of the second part, his executors, administrators, and assigns, shall and will, during the said term, pay and discharge *all taxes*, assessments, and other charges, which shall be taxed, assessed, or charged upon the said premises, or any part thereof. And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may

peaceably and *quietly have*, hold, and enjoy the said demised premises for the term aforesaid, without any interruption or molestation of the said party of the first part, his heirs, or any other person whatever, claiming, or to claim by, from, or under him, or them, or any of them. And also, that in case the said premises shall, at any time during the said term, be destroyed or injured by an accidental fire, the said party of the first part, his executors, administrators, or assigns, shall and will forthwith proceed to rebuild or *repair* the said premises in as good condition as the same were before such fire; and that, until such repairs are made and completed, the said rent shall cease.

and to re-build in case of fire.

In witness whereof, the parties to these presents have hereto set their respective hands and seals, the day and year first above mentioned.

Sealed and delivered }
in the presence of }

A. B. (L. S.)
C. D. (L. S.)

NO. IX.

GENERAL FORMS OF COVENANTS.

General covenants.

1. *By Lessee with Lessor.*

And the said [*lessee*] doth hereby for himself, his heirs,¹ executors, administrators, and assigns,² covenant with the said [*lessor*], his heirs and assigns,³ that, &c.

2. *By two Lessees, jointly and severally with Lessor.*

And the said [*lessees*] do hereby jointly for themselves, their heirs, executors, administrators, and assigns, and each of them severally doth hereby for himself, his heirs, executors, administrators, and assigns, and as to and con-

¹ The covenantor covenants for his heirs for the reasons explained *ante*, § 460 *et seq.* of this volume.

² The covenant should extend to the assigns to guard against any question arising on the second rule in Spencer's Case.

³ If the lessor be seised in fee; but if possessed of a term only, then his executors, administrators, and assigns.

General
covenants.

cerning only his own acts, deeds, and defaults, covenant with the said [lessor], his heirs, and assigns,¹ that, &c.

3. By Lessee with Husband and Wife, seised in Right of the Wife.

And the said [lessee] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [husband], and —, his wife, and the heirs and assigns of the said [wife], that, &c.

4. By each of Two Lessors, to the extent of a Moiety of Damages.

And each of them the said [lessors], severally and apart from the other of them, doth hereby for himself, his heirs, executors, and administrators, and so as to be answerable or accountable only to the extent of one equal half-part of the damages to be recovered under or by virtue of the covenant hereinafter contained, covenant with the said [lessee], his executors, administrators, and assigns,² that, &c.

5. By each of Two Lessees, on an Assignment of their Respective Leases by one Deed, as to the Lands comprised in his Lease.

And the said A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, and so far only as relates to or concerns the said messuage or tenement and premises, comprised in and demised by the said indenture of lease, bearing date on or about the said — day of —; and the said C. D. doth hereby, for himself, his heirs, executors, administrators, and assigns, and so far only as relates to and concerns the said messuage or tenement and premises, comprised in and demised by the said indenture, bearing date on or about the said — day of —, covenant, &c.

¹ If the lessor be seised in fee; but if possessed of a term only, then his executors, administrators, and assigns.

² His heirs, executors, administrators, and assigns, if the lease be granted to the lessee and his heirs (as special occupants) for a life or lives.

NO. X.

SPECIAL FORMS OF COVENANTS THAT MAY BE INSERTED IN A LEASE.Special covenants.**1. To Pay Rent.**

- And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor, that he, the said lessee, his executors, administrators, and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner herein-before mentioned, without any deduction whatsoever.

2. To Pay Taxes.

And also will pay all taxes, rates, duties, and assessments whatsoever, now charged, or hereafter to be charged, upon the said demised premises, or upon the said lessor on account thereof (excepting the land-tax, and all such other taxes, rates, duties, and assessments, or any portion thereof, which the lessee is or may be by law exempted from).

3. To Repair.

And also will during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things, which at any time during the said term shall be erected and made, when, where, and so often as need shall be.

4. To Paint outside every — Year.

And also, that the said lessee, his executors, administrators, and assigns, will, in every — year in the said term, paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colors, in a workmanlike manner.

Special
covenants.

5. To Paint and Paper inside every — Year.

And also that the said [lessee], his executors, administrators, and assigns, will in every — year, paint the inside wood, iron, and other works, now or usually painted, with two coats of proper oil colors, in a workmanlike manner; and also re-paper, with paper of as good a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten, or color such parts of the said premises as are now plastered.

6. To Insure from Fire, and to rebuild in Case of Fire.

And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised, to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, administrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down, or damaged by fire, all and every the sums or sum of money, which shall be recovered or received by the said [lessee], his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burned down or damaged by fire as aforesaid.

7. That the [lessor] may Enter to Repair.

And it is hereby agreed that it shall be lawful for the said lessor, and his agents, at all seasonable times during the said term, to enter the said demised premises to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation which, upon such views, shall be found, and for the amendment of which notice in writing shall be left at the premises, the

said lessee, his executors, administrators, and assigns, will, ^{Special covenants.} within three calendar months next after every such notice, well and sufficiently repair, and make good accordingly.

8. Not to Use the Premises as a Shop.

And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling-house, without the consent, in writing, of the said lessor.

9. Not to Assign without Leave.

And also that the said [lessee] shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed procure the said premises, or any of them, to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent, in writing, of the said [lessor], his executors, administrators, or assigns, first had and obtained.

10. To Leave the Premises in Good Repair.

And further, that the said [lessee] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures, now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted.

11. To Insure Future Buildings when Covered in.

And also that he the said [lessee], his executors, administrators, or assigns, shall and will, at his and their own expense, from time to time insure, or cause to be insured, and during the said term kept insured, every additional building which may hereafter, with such appro-

Covenants
by lessee.

Covenants
by lessee.

bation as is hereinafter mentioned, be built on the said ground hereby demised, or any part thereof, and effect the same within six days after each such building shall be built or covered in; and will increase the amount of such insurances respectively, when and as each such building shall be completed, so as to make the sum insured thereon equal to three-fourth parts, at least, of the then value thereof.

12. To Lay out a given Sum in Repairs.

That he, the said [*lessee*], his executors, administrators, or assigns, will, within the first three years of the said term hereby granted, lay out and expend the sum of —, at least, in and upon the substantial repairs of the said demised premises, and every part thereof; the application of the said sum, and the said reparation of the said premises as aforesaid, to be from time to time surveyed, inspected, and approved by such proper person or persons as the said [*lessor*], his heirs or assigns, shall appoint and direct to survey and inspect the same. And also that he, the said [*lessee*], his executors, administrators, and assigns, will when required produce and deliver to the said [*lessor*], his heirs, or assigns, the bills and receipts of the different tradesmen employed in doing such repairs as aforesaid, for the respective sums to be paid them for that purpose, or duplicates thereof.

13. To Pay Share of Expenses of Repairing Ways.

And also will, from time to time, pay and allow a reasonable proportion towards the expenses of making, supporting, and repairing all ways, roads, pavements, party-walls or party-fence walls, or fences, gutters, drains, sewers, pipes, and watercourses, belonging, or which at any time shall belong, to the premises hereby demised, or which shall be used for the convenience of the same, or any part thereof, in common with said premises near or adjoining thereto, or which shall be reasonably required by the public authorities, to be made and formed for the purpose of being so used, and towards the expenses of cleansing such gutters drains, sewers, pipes, and watercourses, such proportion to

be ascertained by the architect or surveyor for the time being of the said public authorities ; and that, in default of payment of such proportion, the same shall be recoverable as or in the nature of rent in arrear.

Covenants
by lessee.

14. *Another Form.*

And also that he, the said [lessee], his executors, administrators, and assigns, shall and will, from time to time during the said term, pay a reasonable share of the charges of making, repairing, and cleansing all party-walls, fences, sewers, drains, gutters, and other easements belonging, or which shall belong to the said premises hereby demised, in common with the owners or occupiers of any adjoining premises.

15. *To Procure Supply of Water for Demised Premises.*

And also that he, the said [lessee], his executors, administrators, and assigns, shall and will, during the said term hereby granted, procure the supply of water for the said messuage and premises hereby demised, from the Water Company ; provided that such company so to be named shall yield water for that supply of as good quality, in a sufficient quantity, and on as reasonable terms, as the same company shall supply other premises in the same vicinity or neighborhood, or as the premises hereby demised could be supplied by any other company or persons.

16. *By Lessee of a Public House, to Purchase his Porter of Lessor.*

That he, the said [lessee], his executors, administrators, and assigns, will, at all times during the said term, as often as his or their occasion shall require, purchase of and from the said [lessor], his executors, or administrators, either alone, or jointly with his or their partner or partners for the time being, or such other person or persons carrying on the business of brewers as he, the said [lessor], his executors or administrators, shall appoint, all the beer, called porter, that shall be sold and disposed of in the

Covenants
by lessee.

said —— house, called the ——, or drawn in the same for sale ; and shall not deal or contract with any other person or persons for any porter, to be sold or drawn in the said house ; provided that the said [*lessor*], his executors, or administrators, shall at such times deal in and vend such porter as aforesaid, and be willing to supply the same to the said [*lessee*], his executors, administrators, and assigns, at the fair current market price thereof. And also that if, at any time hereafter during the said term, the said [*lessee*], his executors, administrators, or assigns, shall grant any underlease of, or assign over his interest in, the said premises, there shall be contained in such underlease, or in the deed whereby his interest shall be assigned, a covenant on the part of the underlessee or assignee, his or her executors, administrators, or assigns, to be entered into with the said [*lessor*], his executors and administrators, who shall be made parties for the purpose, to the same or the like effect, and subject to the same or the like proviso, *mutatis mutandis*, as is lastly hereinbefore contained.

17. That Lessor and his Tenants shall have Watercourse through Demised Premises.

And also that the said [*lessor*], and his assigns, and his and their tenants, shall have free liberty of watercourse in and through the premises hereby demised, from any adjoining premises, or other estates belonging to the said lessor, by means of the sewers, drains, or channels, there to carry off the water from the other houses, near or adjoining thereto, the person or persons forming or using any such watercourses making good all damage occasioned thereby, and contributing to the expense of keeping in repair and cleansing the same.

18. Not to Obstruct Lights by Building.

And shall not, by building or otherwise, stop or obstruct any light or lights belonging to any messuage or tenement, the estate or interest whereof, in possession or in reversion, is in the said [*lessor*].

19. In a Building Lease, not to Permit Thoroughfare over Premises.

And also that the said [lessee], his executors, administrators, or assigns, will not, at any time or times during the said term, permit any way or thoroughfare over or through any part of the said premises hereby demised.

Covenants
by lessee.

20. Not to Assign Premises, or Underlet them for a Longer Term than a year without giving Lessor a Right of Pre-emption.

And also that the said [lessee], his executors, or administrators, shall not nor will, at any time during the said term, assign and transfer the said premises, or any part thereof, or underlet the same, or any part thereof, for a longer term than one year, to any person or persons whomsoever, except a person or persons who shall have entered into partnership with him, the said [lessee], his executors, or administrators, in the business which shall then be carried on by him or them, at the said factory and premises, or to whom the said [lessee], his executors, or administrators, shall have assigned the whole or some part of his said business, without first offering to sell and assign the same premises, with the buildings and erections thereon, to the said [lessor], or other the person or persons who shall then be entitled to the reversion of the said premises, immediately expectant on the determination of the said term, at a fair valuation, to be made by two indifferent persons, one to be chosen by the said [lessee], his executors, or administrators, and the other by the said [lessor], or other the person or persons entitled as aforesaid; and, in case of the disagreement of such two persons, then by an umpire, to be chosen for that purpose by such two persons, before they proceed to make such valuation; and, in case the said [lessor], or other the person or persons then entitled as aforesaid, shall refuse or decline to take to and purchase the said premises at such valuation, or shall omit or neglect to give notice of his or their determination so to do, for the space of three calendar months next after such offer shall be made in writing to him or them as aforesaid,

**Covenants
by lessee.**

it shall be lawful for the said [lessee], his executors, or administrators, to assign, or transfer, or underlet the said premises, or any part of the same, to any person or persons whomsoever, as he or they shall think fit.

21. To leave Assignment or Underlease, at Office of Lessor's Solicitor, for Registry.

That in case the said premises or any part thereof shall be assigned or underlet for all or any part of the term hereby granted, every or any assignment or underlease to be so made shall, within three calendar months after the execution of the same, be left for not less than seven days at the office of the solicitor for the time being of the said [lessor], his heirs, appointees, or assigns, to the intent that the same may be there registered, and such registry to be at the expense of the said [lessee], his executors, administrators, or assigns.

22. To Keep the Orchards fully Planted, and Preserve the Same from Injury by Cattle.¹

And also that the said [lessee], his executors, administrators, and assigns, will at all times during the said term keep the orchards full treed, and planted with good, thriving young apple-trees, of such sorts and sizes as the said [lessor], his heirs, or assigns, shall direct; the said [lessee], his executors, administrators, or assigns taking the old decayed trees in lieu thereof; and will fence out and preserve the same from being injured by cattle or otherwise, and not suffer any cattle that may injure the trees in such orchards to depasture therein.

23. To Keep Lawn and Garden in Order.

And also shall and will, at his and their own costs, keep up and preserve in good condition the lawn and garden belonging to the said messuage, in the same order and form as the same respectively are now in, and the fences

¹ In addition to the forms contained in this division of the Appendix, a great variety of agricultural covenants will be found in the precedents of farming leases inserted in a subsequent part.

and walls around and about the same ; and do or cause to be done, in proper and reasonable times of the year and in a proper manner, all necessary work in and to the same, and in particular for the preserving, cherishing, encouraging, and keeping in health and bearing the wall and other fruit-trees, and the herbs, shrubs, plants, flowers, and roots now growing, or henceforth during the said term to grow therein, and for the due, orderly, and seasonable manuring, cultivating, and cropping the same during the said term.

Covenants
by lessee.

24. *Not to convert Old Meadow into Tillage.*

And shall not nor will break up or convert into tillage any of the old meadow or pasture ground belonging to the said demised premises ; and shall not mow the same without manuring every acre thereof with eight hogsheads of good, well-burnt stone lime, or one hundred and twenty wagon-loads of good rotten dung, and so in proportion for a less or greater quantity an acre, except such part of the meadow lands as shall have been well flooded with water in the winter preceding every mowth.

25. *Not to make Hedges, except under Certain Conditions.*

And shall not nor will at any time during the said term permit or suffer the growth of the hedges to be cut, without new-making the same ; nor make any of the hedges on the said premises, unless the adjoining ground, if tillage ground, shall be in tillage for the first crop, and then shall and will new-make, cast, dyke, and thatch such hedges in a husbandlike manner. And shall not nor will permit any wood to be cut under seven years' growth, nor any in the last two years of the said term. And shall and will give notice in writing unto the said [lessors], or one of them, their, or one of their heirs or assigns, at least one clear month previously to the time of making any hedge, that the trees, plants, and saplings which are intended to remain therein may be marked.

26. *That Lessor may, in last Year of Term, enter on Part of Demised Premises to prepare next Wheat Crop.*

Covenants
by lessee.

And also that the said [lessor], his heirs, or assigns, and his or their succeeding tenant, shall be at liberty at any time after the — day of —, in the last year of the said term, to enter upon such part of the said demised lands, not exceeding twenty acres, as shall be in course for wheat in the succeeding year, the same to prepare for his or their wheat crop and do the needful husbandry thereon, allowing unto the said [lessee], his executors, administrators, or assigns a reasonable compensation therefor.

27. *The Lessor Covenants for Quiet Enjoyment.*

And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

28. *To find Lessee Rough Timber for Repairs.*

And also that he, the said [lessor], his heirs, and assigns, will from time to time, and at all times during the said term, find, provide, and allow unto the said [lessee], his executors, administrators, and assigns, on the said demised premises, or within four miles thereof, a sufficient quantity of rough timber, for keeping the said premises, with the gates, posts, pales, rails, and fences thereon, in proper condition and repair, upon request in writing specifying the quantity wanted for that purpose being made by the said [lessee], his executors, administrators, or assigns.

29. To Rebuild or Repair in Case of Fire.

That in case the said premises hereby demised, or any part thereof, shall at any time or times during the continuance of this demise happen to be damaged or destroyed by fire, he, the said [lessor], his heirs, or assigns, will with all convenient speed repair or rebuild the same premises which shall or may happen to be damaged or destroyed by fire as aforesaid, and make the same again fit for the habitation of the said [lessee], his executors, administrators, or assigns.

30. To lay out a Given Sum in Repairs, in case of Accidental Fire.

* That if the said buildings hereby demised, or any part thereof, shall at any time or times from the day of the date hereof until the commencement, and thence during the continuance of the term hereby granted, be burned down or damaged by fire (other than through the wilful neglect or default of the said [lessee], his executors, administrators, or assigns), and in case every or any such assignment or under-lease shall have been so left for registry as aforesaid, and no hazardous trade or business shall be carried on upon the said premises without consent as aforesaid, but not otherwise, the said [lessor] shall forthwith lay out and expend (whether any insurance from fire shall have been effected upon the said premises or not) the sum of —, or so much thereof as may be sufficient for making good such loss or damage, or so far as the same will extend for that purpose, upon the same plan as before such fire happened, or such other plan as by the surveyor for the time being of the said [lessor], his heirs, appointees, or assigns shall be approved.

31. To Renew the Lease.

And that the said [lessor], his executors, administrators, or assigns will, on or before the expiration of this present lease, at the request and expense of the said [lessee], his executors, administrators, or assigns, grant

Covenants
by lessee.

and execute to him and them a new lease of the premises hereby demised, with their appurtenances, for the further term of twenty-one years, to commence from the expiration of the term hereby granted, at the same yearly rent, payable in the like manner, and subject to the like covenants, provisos, and agreements (except a covenant for further renewal) as are contained in these presents.

32. *For Title in an Assignment of Leaseholds.*

Covenants
by assignor
of lease.

And the said [assignor] doth, &c., that, notwithstanding any act, deed, or thing whatsoever made, done, or suffered to the contrary by him, the said [assignor], the said [hereinbefore in part recited] indenture of lease is still in full force for the said residue of the said term thereby granted, and neither void nor voidable. And also that, notwithstanding any such act, deed, or thing, as aforesaid, he, the said [assignor] now hath in himself good right by these presents to assign the said messuage or tenement and premises, with their rights, members, and appurtenances, unto the said [assignee] for the residue of the said term of — years, in manner aforesaid. And also that, subject to the payment of the rent, and the observance and performance of the covenants, provisos, and conditions in the said lease contained, and by or on the part of the [lessee], his executors, administrators, or assigns, to be observed and performed, it shall be lawful for the said [assignee], his executors, administrators, or assigns, henceforth, during the residue of the said term, to enter into and upon, hold, and enjoy the said messuage or tenement and premises, with their rights, members, and appurtenances, and to receive and take the rents and profits thereof, without any hindrance or interruption whatsoever by him, the said [assignor], his executors, or administrators, or any other person or persons whomsoever, lawfully, or equitably, and rightfully claiming, or to claim any estate, right, title, or interest, at law or in equity, of, in, to, or out of the same messuage or tenement and premises, or any part thereof, by, from, through, under, or in trust for him, the said [assignor], his executors, or administrators. And that free and clear, and freely and clearly and absolutely discharged, or otherwise, by him, the said [assignor],

his heirs, executors, or administrators, at his or their own costs in all things, protected and kept indemnified from and against all former and other assignments, surrenders, forfeitures, and cause or causes of forfeiture, arrears of rent, estates, titles, charges, and encumbrances, whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, made, committed, occasioned, or suffered by the said [*assignor*], his executors, or administrators, or any person or persons rightfully claiming, or to claim, any estate, right, title, or interest, at law or in equity, of, in, to, or out of the same messuage or tenement and premises, or any part thereof, by, from, through, under, or in trust for him, the said [*assignor*], his executors, or administrators, or by his or their acts, means, consent, default, privity, or procurement. And moreover, that he, the said [*assignor*], his executors, and administrators, and all persons whosoever lawfully or equitably and rightfully claiming, or to claim, any estate, right, title, or interest, at law or in equity, of, in, to, out of, or upon the said messuage or tenement and premises, or any part thereof, by, from, under, or in trust for him, the said [*assignor*], his executors, or administrators, will henceforth, during the residue of the said term, upon every reasonable request, and at the cost of the said [*assignee*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such lawful and reasonable acts, deeds, and assurances in the law whatsoever, for the further, better, or more satisfactorily assigning or assuring the said messuage or tenement and premises, or any part thereof, with the rights, members, and appurtenances, unto the said [*assignee*], his executors, administrators, or assigns, for the then residue of the said term of —— years, as by the said [*assignee*], his executors, administrators, or assigns, or his and their counsel in the law, shall be reasonably required, and be tendered to be made, done, and executed.

Covenants
by assignor
of lease.

33. *By Assignee of a Lease, of Future Payment of Rent and Performance of Covenants, and for the Assignor's Indemnity.*

Covenants
by assignee
of lease.

And the said [assignee] doth hereby, for himself, &c., that he, the said [assignee], his executors, administrators, or assigns, will from time to time, during the residue of the said term, pay the said yearly sum of ——, when and as the same shall henceforth become due, and observe and perform the covenants, provisos, and conditions, in the same indenture contained, and which, by or on the part of the said [lessee], his executors, administrators, and assigns, are henceforth to be observed and performed. And also will, at all times hereafter, at his or their own costs, defend, save harmless, and keep indemnified the said [assignor], his heirs, executors, and administrators, and his and their lands, tenements, goods, chattels, and effects, against all payments, costs, losses, damages, and expenses whatsoever, which he or they shall or may make, pay, sustain, or be liable to, on account of the said yearly rent, which shall henceforth become due and payable, or any part thereof, and on account of the breach, non-performance, or non-observance by or on the part of the said [assignee], his executors, administrators, or assigns, of all and every or any of the covenants, provisos, and conditions contained in the said indenture of lease, to be observed and performed by the said [lessee], his executors, administrators, and assigns, and also against all actions and suits at law or in equity, which shall be commenced or prosecuted against the said [assignor], his heirs, executors, or administrators, for or on account of the said rent, covenants, and provisos, and conditions, or any of them, and henceforth to be paid, observed, and performed.

NO. XI.

PROVISOS AND DECLARATIONS.

1. For Lessor's Re-entry on Lessee's Non-payment of Rent or Non-performance of Covenants.¹

Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained, on the part of the said lessee, his executors, administrators, and assigns, then, and in either of such cases, it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

Provisos and declarations.

2. For Lessor's Re-entry on Non-payment of Rent after Demand or Notice.

Provided always, that if the rent hereby reserved, or any part thereof, shall at any time be in arrear for the space of one year, and not paid within six calendar months after the same shall have become due, and be demanded by a notice in writing, to be delivered to the said [lessee], his executors, administrators, or assigns, or to be affixed on some conspicuous part of the premises hereby demised, or left with the occupier, or some or one of the occupiers of the same premises, or any part thereof, it shall be lawful for the said [lessor], &c.

¹ The advantage of a proviso for re-entry consists in its enabling the lessor to wrest his property from the hands of a troublesome or insolvent tenant, upon whom an action or distress for rent would be thrown away. It affords the lessor an indemnity against future loss, though he cannot by its agency recover past claims.

3. *That Lessor shall not Re-enter for a Forfeiture without Notice.*

Provisos and declarations. Provided always, that no breach of any of the covenants hereinbefore contained (except the covenant for payment of rent, and the covenant for insurance against fire), shall occasion any forfeiture of these presents, or the estate hereby granted, or give any right of re-entry pursuant to the clause in that behalf hereinbefore contained, unless or until the said [lessor], his heirs, or assigns, shall have given unto the said [lessee], his executors, administrators, or assigns, or unto the tenant in the actual possession of the premises, or, in case there shall be no tenant in the actual possession of the premises, shall have affixed upon some notorious part of the premises a notice in writing, bearing date on the day of giving or affixing such notice, and specifically mentioning the breach or breaches of covenant complained of, and expressly notifying that if the same be not remedied within the space of three calendar months from the date of such notice, the said [lessor], his heirs, or assigns, intends to enter upon the premises as forfeited, pursuant to a clause for that purpose in the lease thereof contained, and unless such breach or breaches shall not be remedied within the space of three calendar months from the date of such notice.

4. *For Lessor's Re-entry into that Part only of Premises in Respect of which Lessee shall make Default.*

Provided always, and it is hereby expressly agreed, that if any one or more of the rents hereby reserved, or any part thereof respectively, shall be unpaid by the space of — days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance or non-observance of all or any one or more of the covenants or agreements herein contained, on the part of the said [lessee], his executors, administrators, or assigns, then, and in any or either of the said cases, it shall be lawful for the said [lessor], his heirs, or assigns to re-enter into, or upon that part, or those respective parts

only of the said premises hereby demised, in respect of which there shall have been such non-payment, non-performance, non-observance, or default; it being the true intent and meaning of these presents that the right of re-entry of the said [lessor], his heirs, or assigns under this present provision shall not extend or be applicable to any part or parts of the said premises hereby demised, in respect whereof the rent, covenants, and agreements shall have been duly paid, performed, and observed.

5. For Suspension or Apportionment of Rent on Premises becoming Uninhabitable from Fire.

Provided always, and notwithstanding any thing herein-before contained, that if the said messuage or tenement and premises hereby demised shall be materially injured by fire, so as to be rendered unfit for habitation and for carrying on the business of a coffee-house and tavern, and the said [lessee], his executors, administrators, or assigns, or his or their under-tenants, shall actually quit the occupation of the same messuage, etc., then, during such time as the same messuage, etc., shall remain unfit for habitation, and the occupation of the same shall be quitted as aforesaid, the rent hereby reserved shall be suspended or apportioned so and in such manner that the said [lessee], his executors, administrators, or assigns shall be entitled to retain or be discharged from so much and such part of the same rent as shall be in proportion to the time or number of days during which the said messuage, etc., shall remain unfit for habitation, and the said [lessee], his executors, administrators, and assigns, or his or their under-tenants, shall actually cease to inhabit the same.

6. Another Form.

And further, that in case the said messuage or tenement and premises, or such of them as shall at any time or times during the said term be destroyed or damaged by fire, shall not be rebuilt or repaired by the said [lessor], his heirs, or assigns within the space of six calendar months next after such fire happening, then the said rent hereby reserved shall cease and be suspended until the said prem-

Provisos and declarations. ises so destroyed or damaged by fire shall be rebuilt or repaired fit for the occupation of the said [lessee], his executors, administrators, or assigns ; and at that time the said rent shall revive and recommence, and become again payable in manner aforesaid.

7. *For Cesser of Term in case of Fire, the Tenant having the Option of Giving up Possession, or of Repairing, and Continuing Tenant.*

Provided always, nevertheless (and it is hereby further declared and agreed), that if the said messuage or tenement and premises hereby demised, or intended so to be, or any part thereof, or any other building erected or to be erected on the said piece or parcel of ground hereby demised, or intended so to be, or any part thereof, shall, at any time or times during the said term of —— years be destroyed or damaged by fire, the said [lessee], his executors, administrators, and assigns shall have the option, at any time within fourteen days after such fire, of giving notice that the said term hereby granted shall cease or determine on the next rent-day after such fire ; and in that case, and from that time, provided an insurance shall have been made and kept on foot pursuant to the covenant of the said [lessee] hereinbefore contained, and provided all arrears of rent shall be paid up to that day, the said term shall cease and determine ; and the said [lessee], his executors, administrators, and assigns shall be discharged of and from any further payment of the rent hereby reserved, or performance of the covenants, provisos, and conditions hereinbefore contained ; and in that case, also, the money which shall become payable by virtue of any such insurance, and the remaining materials of the buildings, shall become and be the absolute property of the said [lessor], his heirs, or assigns ; or the said [lessee], his executors, administrators, or assigns shall have the liberty of continuing the tenant or tenants for the residue of the said term ; and in that case he or they shall continue such tenant or tenants, and shall reinstate the buildings so destroyed or damaged by fire to the satisfaction of the surveyor for the time being of the said [lessor], his heirs, or assigns, within —— after such fire ; then the remaining

Provisos and
declarations.

materials of the buildings shall become and be the property of the said [lessee], his executors, administrators, or assigns ; and as soon as the loss or damage by fire shall be repaired, the sum to be received for such insurance shall be paid to him or them.

8. For Apportionment of Rent, on Surrender by Lessee of Part of Demised Premises.

And it is hereby further declared and agreed that so much and such part of the said premises as were granted to the said [lessee] by the said (hereinbefore in part recited) indenture of lease, and are not hereby surrendered to the said [lessor] as aforesaid, shall henceforth be held and enjoyed by the said [lessee], his executors, administrators, and assigns, at the reduced yearly rent of —, by way of apportionment of the said rent of —, and under and subject to the same covenants, provisos, and conditions as are contained in the same indenture of lease.

9. Between Vendor [Lessor] and Purchaser for Apportionment of Rent, on a Sale of the Reversion of Part of the Demised Premises.

And the said [vendor-lessor] and [purchaser], as far as they lawfully may or can, do hereby mutually consent and agree and also direct and appoint that the said yearly sum of —, payable by the said [lessee] as aforesaid, shall (subject to a proportional part of the deductions to be made out of the said rent) henceforth during the residue of the term of the said [lessee] in the said lands and hereditaments hereby released and conveyed, or intended so to be, be payable and paid to the said [purchaser], his heirs and assigns, as his and their proportion of the said rent, for or in respect of so many and such parts of the lands and hereditaments out of which the same rent is reserved as are hereby released and conveyed, or intended so to be.

10. *For Determination of Lease at the End of first Fourteen Years at Option of Lessee.*

Provisos and declarations.

Provided always, that if the said [lessee], his executors, administrators, or assigns shall be desirous of quitting the said premises, and surrendering and delivering up this present indenture of lease, and of such his, her, or their desire shall give notice in writing, to be delivered to the said [lessor], his heirs, or assigns, or to be left at his, her, or their respective usual or last known place of abode at least twelve calendar months before the end or expiration of the first fourteen years of the said term hereby granted, and if the said yearly rent hereby reserved shall be paid up to the time of such quitting, and the said premises left in such good and sufficient repair as hereinbefore mentioned, and all and every the said taxes and assessments paid and discharged, — then, from and immediately after the end and expiration of the first fourteen years of the said term hereby granted, these presents and everything herein contained shall thenceforth cease and determine.

11. *For Determination of Lease by Either at the End of first Three or Five Years of the Term, on giving Notice to the Other.*

Provided always, that if the said [lessor], his executors, administrators, or assigns shall be desirous of putting an end to the said term of seven years hereby granted at the end of the first three or five years thereof, and shall give unto the said [lessee], his executors, administrators, or assigns six calendar months' notice in writing of such his or their desire, previously to the expiration of the first three or five years ; or if the said [lessee], his executors, administrators, or assigns shall be desirous to quit the said premises hereby demised at the end of the first three or five years of the said term of seven years, and of such his or their desire shall give six calendar months' notice in writing to the said [lessor], his executors, administrators, or assigns, before the expiration of the said first three or five years, — then, and in either of the said cases, these presents, and every clause and thing herein contained,

shall at the expiration of the first three or five years of the said term cease and determine, without prejudice, nevertheless, to any remedy which either of the said persons, parties hereto, or his respective representatives, may have against the other of them, or his representatives, for breach, non-observance, or non-performance of the said covenants or agreements hereinbefore contained, or any or either of them.

12. In Lease for Lives, or for Years determinable with Lives, that Proof of Lives being in Existence shall lie on Lessee.

Provided always, that when and as often as any question shall arise in any court of justice, whether the persons or person on whose death the term hereby granted is made determinable be living or dead, it shall be incumbent on the person or persons then interested in, or claiming to have the right of, the said premises, by or under this present demise, to prove such person or persons to be living; and that, in default of such proof, such person or persons shall be deemed and taken to be dead, any law or usage to the contrary notwithstanding.

13. To enable Under-Lessee to pay his Rent to Original Lessor.

And it is hereby further declared and agreed that the said [under-lessor], his executors, or administrators, shall pay the original rent reserved to the said [original lessor], his heirs, or assigns, within ten days next after the same shall have become due quarterly; but in case he shall neglect or refuse so to do, then it shall be lawful for the said [under-lessee], his executors, administrators, or assigns, to pay the same unto the said [original lessor], his heirs, or assigns, by and out of the rent hereby reserved, if he or they shall accept thereof; and that his or their receipts shall be good and effectual discharges for so much of the rents for which such receipts shall be given.

14. That, on Lessee's Default, Lessor may insure, and recover Premiums, as Rent in Arrear.

Provisos and declarations.

And that if the said [lessee], his executors, administrators, or assigns, shall, at any time during the said term, neglect or refuse to effect or renew, and continue such insurance or insurances, or to produce such policy or policies, or any such receipt as aforesaid, then it shall be lawful for the said [lessor], his heirs, executors, administrators, or assigns, to insure the said premises in such manner as he or they shall think proper; and the amount of the sum or sums which shall from time to time be expended in so doing shall be added to the said yearly rent hereby reserved, and shall or may be recovered in the same manner as rent in arrear; and that, from time to time, in case of fire, all such sum and sums of money as shall be recovered or received, by virtue of such insurance or insurances, shall, with all convenient speed, be applied, expended, and paid out, under the direction of the said [lessor], his heirs, or assigns, or of his or their surveyor, in rebuilding or restoring and repairing the said erections, buildings, and premises; and in case of deficiency, the same shall be made good by the said [lessee], his executors, administrators, or assigns.

NO. XII.

CONCLUSIONS OF LEASES.

1. In a Lease between Private Individuals, when executed by Both.

Conclusions of leases.

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

2. In a Lease by a Corporation.

In witness whereof, the said [lessors] have, to one part of these presents, caused their common seal to be affixed, and to another part of these presents the said [lessee] hath set his hand and seal the day and year first above written.

Conclusions
of leases.

NO. XIII.

A Lease of City Property with Covenants.

This indenture, made the first day of April, one thousand ^{Parties, &c.,} eight hundred and forty-four, between A. B., of the city of New York, Esquire, party of the first part, and C. D., of said city, merchant, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained, on the part and behalf of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed; has granted, demised, and to farm letten, and by ^{grant and} ^{demeise} these presents does grant, demise, and to farm let unto the said party of the second part, his executors, administrators, and assigns, all that certain messuage or dwelling-house and lot of ground, situate, lying, and being in the fifteenth ward of the said city of New York, and known as number —, in Tenth Street, bounded as follows, to wit: beginning at a point on the southerly side of Tenth Street distant westerly from the south-westerly corner of Broadway and Tenth Street three hundred feet, and running thence westerly in front twenty-five feet, thence southerly, at right angles to Tenth Street, ninety-eight feet, thence easterly parallel to Tenth Street, twenty-five feet, thence northerly, at right angles to Tenth Street, ninety-eight feet, to Tenth Street, at the point or place of beginning. To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his executors, administrators, and ^{the prem-} ^{ises.}

**Reservation
of rent.**

**Proviso for
re-entry,**

**and for dis-
tress.**

**Lessee
covenants to
pay rent;**

assigns, from the first day of May, one thousand eight hundred and forty, for and during, and until the full end and term of twenty-one years thence next ensuing, and fully to be complete and ended; yielding and paying therefor unto the said party of the first part, his heirs, or assigns, yearly, and every year during the said term hereby granted, the yearly rent or sum of five hundred dollars, lawful money of the United States of America, in equal quarter-yearly payments, to wit, on the first day of May, August, November, and February, in each and every of the said years, provided always, nevertheless, that if the yearly rent above reserved, or any part thereof, shall be behind or unpaid for the space of fifteen days next after any of the days of payment, whereon the same ought to be paid as aforesaid, it being first lawfully demanded; or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, his executors, administrators, and assigns, to be paid, kept, and performed; then and from thenceforth it shall and may be lawful for the said party of the first part, his heirs, or assigns, into and upon the said demised premises, and every part thereof, wholly to *re-enter*, and the same to have again, repossess, and enjoy, as in his and their first and former estate; and that from and after such re-entry made, this lease, and everything therein contained, shall determine and be utterly void to all intents and purposes; and also, in the event of the said rent remaining due and unpaid in manner aforesaid, it shall and may be lawful for the said party of the first part, his executors, administrators, and assigns, to distrain for any rent that may remain due thereon, anything hereinbefore contained to the contrary thereof in any wise notwithstanding.

And the said party of the second part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said party of the first part, his heirs, and assigns, by these presents, that the said party of the second part, his executors, administrators, or assigns, shall and will yearly and every year during the said term hereby granted, well and truly pay, or cause to be paid, unto the said party of the first part, his heirs, or assigns, the said *yearly rent* above reserved, on the days and in the manner limited and prescribed as aforesaid for

the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents (save and except at all times during the said term, such proportionable part of the said yearly rent as shall or may grow due during such time as the said tenement shall, without the hindrance of the said C. D., his executors, administrators, or assigns, be and remain uninhabitable by reason of accidental fire).

except in
case of fire;

And also that he, the said C. D., shall and will pay, or cause to be paid, *all taxes*, assessments, and impositions whatsoever (ground-rent only excepted), which at any time during the continuance of the said term, shall or may be assessed or imposed on the said premises, or any part thereof, or on the said A. B., his executors, administrators, or assigns, on account thereof.

to pay taxes
and other
charges;

And also that he, the said C. D., his executors, administrators, or assigns, shall and will, at his or their own proper costs, and charges, cause to be well and sufficiently painted all the outside wood and iron work belonging to the said premises, every third year during the continuance of the said term, and shall and will also, at his and their like proper costs and charges, during the said term, keep in good, sufficient, and tenantable repair, as well all and singular the glass and other windows, rooms, floors, partitions, ceilings, walls, roofs, gutters, fences, pavements, grates, sinks, privies, drains, wells, and watercourses, as also all and every other the parts and appurtenances of the said premises (damage happening by casual fire only excepted).

to keep the
premises in
repair;

damages
by fire
excepted;

And also that he, the said C. D., his executors, administrators, or assigns, shall not, nor will at any time during the continuance of the said term, use, or carry on, or suffer and permit to be used and carried on, in or upon the said premises, or assign over this lease, or any part of the premises herein contained, to any person or persons using or carrying on the trade, business, or calling of a maker of sedan or other chairs, baker, brewer, butcher, currier, distiller, dyer, founder, smith, soap-boiler, school-master, or school-mistress, sugar-baker, auctioneer, pewterer, tallow-chandler, or tallow-melter, working brazier, tinman, tripe-boiler, pipe-maker, pipe-borer, plumber, or any other noxious or offensive trade, business, or calling whatsoever,

not to carry
on offensive
trades;

without the consent, in writing, of the said A. B., his executors, administrators, or assigns, first had and obtained for that purpose.

And also that he, the said C. D., his executors, administrators, or any of them, shall not, nor will at any time during the said term, demise, let, set, or assign over the said premises, or any part thereof, to any person or persons whomsoever, for any term or time whatsoever, without the license and consent of the said A. B., his heirs, or assigns, in writing, under his or their hand, first had and obtained for such purpose.

And also that, on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators, or assigns, shall and will peaceably and quietly leave, surrender, and yield up unto the said party of the first part, his heirs, or assigns, all and singular, the said demised premises, with their appurtenances, in such good, sufficient, and tenantable repair as aforesaid; together with all and every the doors, locks, keys, bolts, bars, chimney-pieces, grates, windows, shelves, and other things thereunto belonging, in as good plight and condition as the same now are (reasonable use and wear thereof, and casualties happening by fire, only excepted).¹

And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, by these presents, that the said party of the second part, his executors, administrators, or assigns paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid, on his or their part; the said party of the second part, his executors, administrators, and assigns, shall and may, at all times during the said term hereby granted, peaceably and quietly have, hold, and enjoy the said demised premises, for and during the said term of years hereby granted, without any manner of let, suit, trouble, or hindrance of or from the said party of the first part, his heirs, executors, administrators, or assigns, or any other person or persons whomsoever, lawfully claiming from, by, or under him, or any of them; and that freed and discharged, or otherwise indemnified of and from all former

assign or
underlet
without the
consent of
lessor;

and surren-
der at the
end of the
term.

Lessor cove-
nants for
quiet enjoy-
ment;

and other grants, sales, feoffments, demises, dower, debts, duties, judgments, ground-rents, due or to grow due thereon during the said term, and all other estates, rights, titles, charges, and encumbrances whatsoever, had, made, done, or suffered in any wise whatsoever, by the said party of the first part, or by any other person or persons whatsoever, having or lawfully claiming any estate, right, title or interest in the said premises, or any part or parcel thereof.

And that the said A. B., his executors, administrators, or assigns shall and will, on or before the expiration of this present lease, on the request, and at the costs and charges of the said C. D., his executors, administrators, and assigns, grant and execute to him and them a new and fresh lease of the premises hereby demised, with their appurtenances, for the further term of twenty-one years, to commence from the expiration of the term hereby granted ; the same to be at the same yearly rent, payable in like manner, and under and subject to the like covenants, provisos, and agreements (except a covenant for further renewal), as are contained in these presents ; such new lease, however, to be granted and valid on condition that the said C. D., his executors, administrators, or assigns, do execute a counterpart thereof, and also pay the said A. B., his executors, administrators, or assigns, the sum of five hundred dollars, at the time of executing said lease, as and by way of fine or premium for the renewal thereof.

to renew the lease;

And also that in case the said premises shall, at any time during the said term, be destroyed or injured by an accidental fire, the said A. B., his executors, administrators, or assigns, shall and will forthwith, as soon as conveniently may be thereafter, proceed to rebuild and repair the same in as good condition as the said premises were in before such fire, and that in the mean time, and until said premises are rebuilt and put in good and tenantable order, the rent hereby reserved shall cease.

and rebuild in case of fire.

In witness whereof, the parties to these presents have hereto set their respective hands and seals the day and year first above written.

Sealed and delivered {
in the presence of }

A. B. (L. s.)
C. D. (L. s.)

NO. XIV.

Agreement for Granting a Farming Lease.

Memorandum of an agreement made this — day of —, in the year —, between A. B., of —, of the one part, and C. D., of —, of the other part, whereby it is agreed that the said A. B. shall, on or before the first day of March, make and execute unto the said C. D., his executors, administrators, and assigns, a good and valid lease of all that messuage, piece, or parcel of land, situate, &c., with the appurtenances thereunto belonging, for the term of — years from the said first day of —, at the yearly rent of — dollars, payable half-yearly, clear of all deductions for taxes, or on any other account whatever; the first payment of said rent to be made on the first day of — next; and at and under the further yearly rent of — dollars for every acre, and so in proportion for a less quantity, of meadow or pasture ground which shall be ploughed or converted into tillage contrary to a covenant to be contained in said lease, as hereinafter directed; the first payment of said last-mentioned rent to be made on the first half-yearly day after such conversion into tillage as aforesaid. And in the said lease there shall be contained covenants on the part of the said C. D., his executors, administrators, and assigns, to pay the aforesaid rents, and to pay all taxes and assessments; for doing all manner of repairs to the building, hedges, ditches, rail and other fences (the said A. B. providing upon the premises, or within two miles thereof, rough timber, bricks, tiles, and lime for the doing thereof, to be conveyed by the said C. D., his executors, administrators, or assigns); for permission for the said A. B., his heirs, or assigns, at all seasonable times to view the state of the premises; that the said C. D., his executors, administrators, or assigns, shall not plough or convert into tillage any of the closes of meadow or pasture ground, without the license of the said A. B., his heirs, or assigns, in writing, first obtained; that the said C. D., his executors, or administrators, shall not carry off from the farm any hay, straw, or other fodder, and that the said C. D., his executors, administrators, or assigns,

shall spread on some part of the said lands, in a husband-like manner, all the dung, manure, and compost which shall arise from the said farm, and shall in all respects cultivate the same in a husbandlike manner, and according to the usual course of husbandry practised in the neighborhood, and shall leave all the dung, manure, and compost of the last year for the use of the landlord, or succeeding tenants. That the said C. D., his executors, administrators, or assigns, shall not cut or flash any of the quick-hedge under three years' growth, and shall cut and flash those at seasonable times in the year, and at the time of doing thereof, shall cleanse the ditches adjoining thereto, and guard and preserve the hedges which shall be so cut and flashed as aforesaid, from destruction or injury by cattle, and shall also, at all times, guard and preserve all young hedges and young trees from the like destruction and injury. That the said C. D., his executors, administrators, or assigns, shall, in the summer immediately preceding the determination of the said term to be granted as aforesaid, prepare for seed, in a husbandlike manner, such part of the land as shall be in a course of fallow, and fit to be sown with a crop the ensuing season, and lay down with clover-seed and rye-grass twenty acres of the arable land, which shall be then in tillage, sowing upon each acre thereof ten pounds of the best clover-seed, and one bushel of the best rye-grass-seed. And in the said lease there shall be contained a proviso for re-entry by the said A. B., his heirs, or assigns, in case of the non-payment of rent for the space of twenty days, or non-performance of the covenants, or in case the said C. D., his executors, administrators, or assigns, shall assign, underlet, or otherwise dispose of the said premises, or any part thereof, or do, commit, or suffer any act or deed, whereby or by means whereof the said premises, or any part thereof, shall be assigned, underlet, or disposed of, without the consent, in writing, of the said A. B., his heirs, or assigns first obtained. And there shall be contained covenants on the part of the said A. B., his heirs, and assigns, for quiet enjoyment. That the said A. B., his heirs, or assigns, shall, upon ten days' notice, provide and allow to the said C. D., his executors, administrators, and assigns upon the premises, or within two miles thereof, all such rough timber,

bricks, tiles, and lime as shall be necessary for the repairs of the premises, the said materials to be conveyed at the expense of the said C. D., his executors, administrators, or assigns. That the said A. B., his heirs and assigns, shall permit the said C. D., his executors, administrators, or assigns, to have the use of the great barn, the stable for four horses adjoining, and the stack-yard and farmyard, until one month after the expiration or determination of the said term, for the convenience of thrashing out the last year's crops of corn and grain, and feeding his or their cattle with the straw and fodder, so that the same may be made into manure, to be left on the said premises as aforesaid; and also some convenient room in the farm-house for his or their servants to lodge and diet in, until the time aforesaid, without any recompense being made for the same respectively.

In witness thereof, the said parties have hereunto set their hands and seals the day and year first above written.

Sealed and delivered }
in the presence of }

A. B. (L. s.)
C. D. (L. s.)

NO. XV.

A New York Manor Lease.¹

Parties.

This indenture, made the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and twenty-six, between Edward P. Livingston, and Elizabeth his wife, of Clermont, Columbia County, and State of New York, of the first part, and Bruce C. Smith, of Lexington, Greene County, and State aforesaid, of the second part, witnesseth: That the party aforesaid of the first part, for and in consideration of the rents and covenants herein-after mentioned, which, on the part and behalf of the party aforesaid of the second part, are to be paid, done, observed, performed, fulfilled, and kept, hath demised, bargained, enfeoffed, set, and to farm let, and by these presents doth demise, set, and to farm let, unto the party aforesaid of the second part, his heirs, and assigns, all that certain parcel of land lying in the town of Lexington, county of Greene, in great lot number twenty-one in the

Premises.

¹ For a history of these leases, see §§ 12, n., 261, 295, 370, 442.

Hardenburge Patent, being in the subdivision number twelve of said lot, and formerly part of Benjamin Chamberlain's farm, beginning on the northerly side of Schoharry Kill, and the iron-wood tree, cornered and marked VxC, and stones round it, runs from thence along the division line between this farm and Benjamin Chamberlain, north, thirty-two degrees and thirty minutes east, thirteen chains and forty-five links to a stake, and stones at the edge of the lowland, and north twenty-eight degrees east, sixty-five chains and fifty links, along a line of marked trees formerly run by George Stimson to an old beech-tree marked B, standing on the old line of marked trees, the bounds of a lot in possession of Richard Peck, thence along the same, north, forty-two degrees and thirty minutes east, one chain and eleven links to a stake and stones, twelve links north-east of the old beech corner tree, thence along the old marked line, south, fifty-seven degrees and thirty minutes, east, twelve chains to an old beech corner tree, thence along an old line of marked trees, the bounds of Samuel Adams's lot and Abraham Van Volkenburgh's lot, south thirty-two degrees and thirty minutes west, eighty-one chains to the said Schoharry Kill, to an old cornered maple-tree, standing one chain and sixty links south, forty-three degrees west from the south-west corner of Caleb Hyde's house, thence down the stream of the said Kill to the place of beginning, containing eighty acres, be the same more or less, being the farm heretofore leased to Jeremiah Martin, on the 29th of September, 1818. Together with all and singular the trees, woods, and underwoods, to be made use of on the premises, and nowhere else. Saving and always reserving to the party of the first part, their heirs and assigns forever, all streams, creeks, and runs of water, and all mines, minerals, ores, and metals of every nature and kind, upon or within the farm hereby demised, standing, being, or to be found, with full and free ingress, egress, regress, and power and liberty at all times to search, dig, and carry away the same, or to manufacture the same thereupon, and, for that purpose, to make and erect mills, dams, and other buildings, and also to take and use all such timber, firewood, stone, and other materials, as may be found in any part of the said demised farm, proper and necessary for his or

Reserva-
tions.

Proviso. their use. But it is hereby provided that for so much of the said demised farm as shall by these means become encumbered, or rendered useless to the party of the second part, there shall be deducted out of the yearly rents by these presents reserved a reasonable abatement, in proportion to the whole quantity of the said hereby demised farm, during the time that any part may be so encumbered or rendered useless.

Habendum. To have and to hold the said farm, land, and premises hereinbefore demised (saving, reserving, and accepting as aforesaid), unto the party aforesaid of the second part, his executors, administrators, and assigns forever, from the day before the date of these presents ; to the proper use, benefit, and behoof of the party aforesaid of the second part, his executors, administrators, and assigns, yielding and paying therefor, during the continuance of this present lease, yearly and every year, unto the party aforesaid of the first part, their heirs, or assigns,

Yearly rent. the yearly rent of seventeen and a half bushels of good, sweet, merchantable winter wheat, for the above-demised premises, to be delivered and paid by the party aforesaid of the second part, his heirs, or assigns, on the first day of every month of May, yearly, at such store-house or place within fifty miles from the above-demised premises, and to such person as the party aforesaid of the first part, their heirs, executors, administrators, or assigns, shall from time to time, at pleasure, appoint or direct to receive the same, the first payment to be made on the first day of May, in the year of our Lord one thousand eight hundred and twenty-seven ; which rent is to be paid without any deduction or abatement of or for any manner of taxes, charges, assessments, or impositions whatsoever, that have or shall be taxed, charged, assessed, or imposed upon the hereby demised premises, or any part thereof, or upon the party aforesaid of the second part, his heirs, or assigns, for or in respect thereof, by any power or authority whatsoever ; provided always, that these presents are upon this condition, that if the said yearly rent, or any part thereof, shall be behind, and unpaid, or unperformed in any part or in all, by the space of twenty days next after any of the days appointed or to be appointed as aforesaid, for rendering, paying, or performing the same as aforesaid ; or if the party aforesaid of the second part, his heirs, or assigns, shall not take

Rights of re-entry.

possession and improve the farm aforesaid within six months after date hereof, or leave the possession for the space of six months, or shall not observe, keep, and perform the several articles, covenants, and agreements in these presents particularly hereafter expressed, on his or their part to be observed, kept, and performed; that then, and in any or either of these cases, these presents, and the estate by these presents demised, or intended to be demised, are to be void, determine, and cease; and thereupon it shall and may be lawful to and for the party of the first part, their heirs, and assigns, into the said farm, land, and premises, or in any part, in the name of the whole, to re-enter, and have again, retain, repossess, and enjoy, as in their first former estate. And also in case of the party aforesaid of the second part, his heirs, and assigns, or any of them, be minded and desirous hereafter to dispose of the said farm, or any part thereof, or to underlet the same, with the appurtenances, the orchards, fruit-trees, nurseries, dunghill, which shall be deemed parcel of the said farm, that then the party aforesaid of the second part, his heirs, or assigns, shall not nor will not sell or dispose of, or underlet the same, before leave first had and obtained, under the hand and seal of the party aforesaid of the first part, their executors, administrators, or assigns. Also that the said party of the second part shall and will from time to time, and at all times during the term hereby demised, keep, maintain, and preserve the house, barn, barracks, buildings, fences, and enclosures, made or to be made and erected on the hereby demised farm, in good and sufficient repair. Also that the party aforesaid of the second part, his heirs, or assigns, shall, in the first year, strew apple-seed or pomace upon a patch of land on said farm for a nursery, well prepared for that purpose, of at least fifty feet square, to the intent that, within six years, there be planted a regular orchard of one hundred apple-trees at least, at thirty-six feet asunder, and as many of them as may happen to die, others in their stead to be replaced, so that the number of one hundred like trees at least be complete and planted out, and enclosed with a good fence for their safety. Also that the party aforesaid of the second part, his heirs, or assigns, shall not, by themselves or procurement, peel and bark, for tanner's use,

Covenant
against un-
derletting.

Covenant to
repair.

Covenant for
cultivation.

off or from any tree standing or lying down on the said farm ; or, by his or their privity, suffer any wood to be disposed of or burnt into coal for furnace, forge, or bloomery use, or into ashes for any potash work ; or shall the party aforesaid of the second part, his heirs, or assigns, take in or join any other person or persons in conjunction, to farm on shares, or dropping. And also that the party aforesaid of the second part, his executors, administrators, and assigns, shall, from time to time hereafter, be subject to all reasonable orders, as regulating fences, laying out paths and roads, and to amend and repair the same, when necessarily devised by the party aforesaid of the first part.. And this lease is upon the express condition that the aforesaid land, before it shall be sold, assigned, or underlet, by the said party of the second part, his heirs, or assigns, shall be fixed at the price he or they mean to take, and the first offer thereof, at the said price, shall be made to the said party of the first part, their heirs, or assigns ; and also, when sold, underlet, or mortgaged, or in any way disposed of otherwise than by will or descent, that the person so taking the same shall take a new lease from the said party of the first part, their heirs, or assigns, subject to the same rents, covenants, and conditions contained in this lease, together with a new covenant and condition in all things similar to this ; it being declared to be the intention hereof, that this lease is to be renewed upon every sale, assignment, or underletting, as long as the term hereby granted shall continue, and shall pay to the said party of the first part, their heirs or assigns, one-tenth part of the sale-money, which shall be considered as a condition binding the land, as also all other covenants and conditions herein contained, and for a breach of any of which the said party of the first part, their heirs, or assigns, may re-enter and recover the said land, as if no lease had been granted.

In witness whereof, the parties to these presents have interchangeably set their hands and seals, the day and year first above written.

EDWARD P. LIVINGSTON.

ELIZABETH S. LIVINGSTON.

BRUCE C. SMITH.

Sealed and delivered }
in the presence of }

HORACE STEVENS.

Restraints
upon aliena-
tion.

NO. XVI.

A Building Lease.

This indenture made, &c., between A. B., &c., of the Parties, &c., one part, and C. D. of the other part, witnesseth: That the said A. B., for and in consideration of the rents, covenants, and agreements hereafter reserved and contained, by and on the part and behalf of the said C. D., his executors, administrators, and assigns, to be paid, demise done, and performed, hath demised, leased, set, and to farm let, and by these presents doth demise, lease, set, and to farm let unto the said C. D., his executors, administrators, and assigns, all that piece or parcel of ground situate, lying, and being on, &c., in the said —, containing in breadth on the north side thereof —, and in depth on the east side thereof —, be the same more or less, and on the west side thereof —, east —, and from thence south —, and from thence east, be the same more or less, together with the messuages or tenements, and other the erections and buildings thereon, which the said C. D. shall have full liberty to pull down, and to take to and for his own use; which said piece or parcel of ground abuts north on — aforesaid, south on gardens to some houses on the north side of —, belonging to the said A. B., now on lease to —, east on buildings, &c., and west, &c., and is more fully delineated and described in the plan or ground plot thereof, in the margin of these presents, together with all erections, and buildings to be erected and built thereon, and all ways, paths, passages, drains, water, watercourses, easements, profits, commodities, and appurtenances, whatsoever belonging and which shall belong to the said hereby demised premises, or any part or parcel thereof, to have and to hold the said piece or parcel for the term. of ground, messuages, or tenements, erections, buildings, and premises hereby demised, or intended so to be, with their and every of their appurtenances, unto the said C. D., his executors, administrators, and assigns, from the — day of — last past, before the date thereof, for, and during and unto the full end and term of — years, from thence next ensuing, and fully to be complete and ended, yielding and

*Reservation
of rent.*

paying therefor, for the first year of the said term hereby demised, the rent of a peppercorn on the last day thereof, if demanded, and yielding and paying therefor yearly and every year, for and during the remaining years of the said term hereby demised, unto the said A. B., his heirs, and assigns, the yearly rent or sum of —— of lawful money of the United States of America, by half-yearly payments, on the —— and —— in each year, by even and equal portions, the first payment thereof to begin and be made on ——, in the year of our Lord ——, the said several rents to be paid and payable from time to time, on the several days aforesaid during the said term, free and clear of all rates, taxes, charges, assessments, and payments whatsoever, taxed, charged, assessed, or imposed upon the said hereby leased premises, or any part thereof, by any lawful authority howsoever, during the term hereby granted.

*Lessee cove-
nants to pay
rent;*

*to pay
taxes, &c.;*

*to erect
houses;*

And the said C. D., for himself, his heirs, executors, administrators, and assigns, doth covenant, promise, and agree to and with the said A. B., his heirs and assigns by these presents, in manner following (that is to say), that the said C. D., his heirs, executors, administrators, and assigns, shall and will yearly, and every year during the last years of the said term hereby granted, well and truly pay or cause to be paid unto the said A. B., his heirs, and assigns the said yearly rent or sum of ——, of lawful money of the United States, on the several days and times and in the manner hereinbefore limited and appointed for payment thereof, without making any deduction or abatement thereout, for or in respect of any rates, taxes, assessments, duties, charges, or impositions whatsoever, taxed, charged, assessed, or imposed upon the said hereby-demised premises, or any part thereof, during the said term hereby granted, all which rates, taxes, assessments, duties, charges, or impositions he, the said C. D., his executors, administrators, or assigns shall and will bear, pay, and discharge, and therefore and therefrom acquit, save harmless, and keep indemnified the said A. B., his heirs, and assigns. And that he, the said C. D., his executors, administrators, or assigns shall and will before the expiration of the first year of the term hereby granted, at his and their own proper costs and charges, erect, build, complete,

and in a workmanlike manner finish, one or more good and substantial brick messuages or tenements upon some part of the ground hereby demised, and shall and will lay out and expend therein the sum of — or upwards, and also that he, the said C. D., his executors, administrators, and assigns shall and will from time to time and at all times from and after the said messuage or tenement, erections, and buildings on the said piece of ground hereby demised shall be respectively completed and finished, during the remainder of the said term hereby granted, when, where, and as often as need or occasion shall be and require, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, pave, purge, scour, cleanse, empty, amend, and keep the said messuage or tenement, messuages or tenements, erections and buildings, and all the walls, rails, rights, pavements, grates, privies, sinks, drains, and watercourses thereunto belonging, and which shall belong unto the same, in, by, and with all and all manner of needful and necessary reparations, cleansings, and amendments whatsoever. And that he, the said C. D., his executors, administrators, and assigns shall not nor will during the said term hereby granted permit or suffer any person or persons to use, exercise, or carry on in and upon the said hereby-demised premises, or any part thereof, any trade or business which may be nauseous or offensive, or grow to the annoyance, prejudice, or disturbance of any of the other tenants of the said A. B. near adjoining thereto, and the said messuage or tenement, messuages or tenements, erections, buildings, and premises, with the walls, pavements, sewers, and drains belonging thereto, being in every respect so well and sufficiently repaired, upheld, supported, sustained, maintained, paved, purged, scoured, cleansed, emptied, amended, and kept, shall and will, at the expiration or other sooner determination of the said term hereby granted, peaceably and quietly leave, surrender, and yield up unto the said A. B., his heirs, and assigns, together with all the doors, locks, keys, bolts, bars, wainscots, chimney-pieces, slabs, foot-paces, windows, window-shutters, partitions, dressers, shelves, pumps, water-pipes, rails, and all other things which shall be any ways fixed and fastened to, and shall be standing, being, and set up in and upon the said premises hereby

to repair and
maintain the
same;

not to suffer
offensive
trades to be
carried on
upon the
premises;

surrender at
the end of
the term all
buildings,
fixtures,
&c.;

demised, or any part thereof, within the last years of the said term hereby granted. And that the said C. D., his executors, administrators, and assigns shall and will, at his and their own proper costs and charges, from time to time sufficiently insure all and every the messuages or tenements, erections, and buildings which shall be erected and built upon the said piece or parcel of ground hereby demised, or any part thereof, from casualties by fire during the then remainder of the said term hereby granted, in some or one of the public offices kept for that purpose in New York or Boston; and in case the said messuage or tenements, erections, and buildings, or any of them, or any part of any of them, shall at any time or times during the said term be burnt down, destroyed, or damaged by fire, shall and will, from time to time, immediately afterwards rebuild, or well and sufficiently repair the same. And further, that it shall and may be lawful to and for the said A. B., his heirs, and assigns, or any of them, with workmen or others, in his, their, or any of their company or without, to enter or come into and upon the said demised premises, and every part thereof, at seasonable and convenient times in the daytime, as well at any time or times during the last seven years of the said term hereby granted, to make an inventory or schedule of the several fixtures and things then standing and being in and upon the said hereby-demised premises, which are to be left at the end of the said term to and for the use of the said A. B., his heirs, and assigns, pursuant to the covenant hereinbefore in that behalf contained, as also twice or oftener in every year during the said term hereby granted to view, search, and see the defects and want of reparation of the said premises, and all defects and want of reparations which, upon every or any such view or search shall be from time to time found, to give or leave notice or warning thereof in writing at or upon the said demised premises, unto and for the said C. D., his executors, administrators, or assigns to repair and amend the same. And that the said C. D., his executors, administrators, or assigns shall and will, within three months next after every such notice or warning shall be given or left, at his and their own proper costs and charges, well and sufficiently repair, amend, and make good all and every the defects and want

to keep the premises insured;

and rebuild in case of fire;

permit the lessor to examine the premises;

and that lessee will repair;

of reparations whereof such notice or warning shall be so given or left as aforesaid. Provided always, nevertheless, and these presents are upon this condition, that if the said yearly rent or sum of — hereby reserved, or any part thereof, shall be behind and unpaid by the space of — days next after either of the said days of payment whereon the same ought to be paid as aforesaid (being lawfully demanded), or if the said C. D., his executors, administrators, or assigns shall not well and truly observe, perform, fulfil, and keep all and every the covenants, articles, clauses, conditions, and agreements in these presents expressed and contained, on his and their part and behalf to be performed and kept, according to the true intent and meaning thereof, then and from thenceforth, in either of the said cases, it shall and may be lawful to and for the said A. B., his heirs and assigns, into and upon the said demised premises, or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy as in his and their first and former estate, and the said C. D., his executors, administrators, or assigns, and all other tenants or occupiers of the said premises, thereout and from thence utterly to expel, put out, and amove; and that from and after such re-entry made, this present lease, and every clause, article, and thing herein contained on the lessor's part and behalf from thenceforth to be done and performed, shall cease, determine, and be utterly void to all intents and purposes whatsoever, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

proviso for
re-entry for
a breach of
any covenant
on the part
of lessee;

the lease
thereupon
to become
void.

LESSOR COVE-
NANTS FOR
QUIET ENJOY-
MENT.

And the said A. B., for himself, his heirs, and assigns, doth hereby covenant, promise, and agree to and with the said C. D., his heirs, executors, administrators, and assigns, paying the said yearly rent hereby reserved in manner and form aforesaid, and observing, performing, and keeping all and singular the covenants and agreements hereinbefore mentioned on his and their parts and behalf to be performed and kept, shall and may lawfully, peaceably, and quietly have, hold, occupy, possess, and enjoy the said piece or parcel of ground and premises hereby demised, with their and every of their appurtenances, for and during the said term of — years hereby granted, without any lawful let, trouble, denial, or interruption of

or by the said A.B., his heirs, or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them.

In witness, &c.

NO. XVII.

An indorsement for continuing a Lease for a longer Term after the expiration of the Present.

This indenture, &c., between the within-named A. B., of the one part, and the within-named C. D., of the other part, witnesseth : That for and in consideration of the rent hereby reserved, and of the covenants, conditions, and agreements, respectively hereinafter contained, which, on the part of the said C. D., his executors, administrators, and assigns are to be paid, done, and performed, the said A. B. hath demised, leased, set, and to farm let unto the said C. D., his executors, administrators, and assigns, all that piece or parcel of ground, with the messuage or tenement thereon erected and built, and all and singular other the premises respectively comprised in the within written lease, and thereby demised to the said C. D. (except as therein is excepted), to have and to hold the said piece or parcel of ground, and messuage or tenement, and all and singular other the premises hereby leased, let, and to farm let, or mentioned or intended so to be (except as aforesaid), unto the said C. D., his executors, administrators, and assigns, from the — day of —, which will be in the year of our Lord —, and when the said within written lease will expire, for and during and unto the full end and term of — years longer, from thence next ensuing, and fully to be complete and ended, subject to and under the like rent, and payable in like manner as is within mentioned, for and in respect of the rent reserved in and by the said within written lease, and subject to the like power of entry, as well on the non-payment of rent, as on the happening of any of the other incidents mentioned in the within written proviso, or condition of re-entry, and it is hereby declared and agreed, by and between the said

Continuance
of lease by
indorsement.

parties to these presents, that they and their respective heirs, executors, administrators, and assigns, shall and will, by these presents, during the continuance of the additional term of — years hereby granted, stand and be bound, for and in respect of the said hereby-demised premises, with the appurtenances, in such and the like covenants, conditions, and agreements respectively, as they the said parties, and their respective heirs, executors, administrators, and assigns, do now stand bound in and by the said within lease, for and during the now residue unexpired of the within mentioned term hereby granted, it being the intent and meaning thereof that this present indorsed lease, and the additional term hereby granted, shall be upon such and the like footing, and all the covenants, clauses, conditions, and agreements respectively therein contained, be equally available, take place, and have the like force and effect, to all intents and purposes, as if every article, clause, matter, and thing contained in the said within lease, were inserted and contained in this present indenture.

Agree to be
bound by all
covenants.

In witness, &c.

NO. XVIII.

Underleases by a Mortgagee and Mortgagor of a House and Premises, with a Provision for Payment of the Rent to the Mortgagor.

This indenture, made the — day of —, 18—, between A. B., of — (mortgagee of the messuage or tenement and premises hereinafter described and demised, or intended so to be), of the first part, C. D. of — (mortgagor of the same messuage or tenement and premises), of the second part, and [lessee], of —, of the third part, witnesseth: That in consideration of the rent, covenants, and agreements hereinafter reserved and contained, and on the part of the said [lessee] his executors, administrators, and assigns to be paid, observed, and performed, he, the said [mortgagee] with the consent and approbation of the said [mortgagor], and according to his estate and interest in the premises, doth by these presents demise

Parties

Testatum.

Mortgagor
demises and
mortgagor
demises and
confirms.
Parcels and
general
words.
Habendum.
Reddendum.

and lease, and the said [*mortgagor*] doth by these presents demise, lease, ratify, and confirm unto the said [*lessee*], his executors, administrators, and assigns, all that messuage or tenement, &c., together with all out-houses, buildings, &c., to have and to hold, &c., yielding and paying therefor yearly, during the said term, the yearly rent of —, of lawful money of —, unto the said [*mortgagee*], his executors, administrators, and assigns,¹ subject to such equity of redemption as the said demised premises are now subject or liable to; and subject also to the proviso or agreement hereinafter contained, in respect to the intermediate payment of the said rent, until such notice as is hereinafter mentioned; such yearly rent of — to be paid by quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, clear of the sewers-rate, and all and all manner of taxes, assessments, rates, and impositions whatsoever, now or hereafter to be charged, assessed, or imposed upon the said premises hereby demised, or on the said yearly rent hereby reserved, or on the said [*mortgagee* and *mortgagor*], or either of them, their or either of their heirs, executors, administrators, or assigns, in respect thereof; Provided always, and it is hereby agreed and declared, that in the meantime, and until the said [*mortgagee*], his executors, administrators, or assigns, shall require to have the receipt of the rents and profits of the said premises hereby demised, or intended so to be, and shall give unto the said [*lessee*], his executors, administrators, or assigns, or leave at the same premises notice, in writing, requiring the said [*lessee*], his executors, administrators, or assigns, to pay the said rent hereby reserved to him, the said [*mortgagee*], his executors, administrators, or assigns, the same rent shall or may be paid to the said [*mortgagor*], his executors, administrators, or assigns; and if, at any time previously to such notice having been given or left as aforesaid, the same rent, or any part thereof, be unpaid for the space of fourteen days after the respective days or times whereon the same ought to be paid as aforesaid, then and in such case, and so often as the same shall

Proviso for
payment of
rent to mort-
gagor till
notice by
mortgagee.

Power of
distress to
mortgagor.

¹ The mortgage was upon a term for years, the mortgagor being but a termor.

happen (although no lawful demand shall have been made thereof), it shall be lawful for the said [*mortgagor*], his executors, administrators, or assigns, to enter into and distrain upon the said premises hereby demised for the said yearly rent, or so much thereof as shall then be in arrear, and the distress and distresses then and there made to take, lead, carry away, and impound, and in pound to detain and keep, and in due time afterwards to sell or dispose of, or otherwise to act therein according to the law, to the intent that, by the ways and means aforesaid, he the said [*mortgagor*], his executors, administrators, and assigns, shall and may be fully paid and satisfied the arrears of the said rent, and also all costs, charges, and expenses which shall be sustained or incurred, in consequence of any such distress or distresses. And the said [*lessee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagee*], his executors, administrators, and assigns, and also separately with the said [*mortgagor*], his executors, administrators, and assigns, in manner following: that is to say, that he, the said [*lessee*], his executors, administrators, and assigns shall and will yearly, during the continuance of the said term hereby granted, pay unto the said [*mortgagor*], his executors, administrators, or assigns, until such notice shall have been given or left as aforesaid, and afterwards to the said [*mortgagee*], his executors, administrators, and assigns, the said yearly rent of —, on the respective days, and in manner hereinbefore appointed for payment thereof, without any deduction whatsoever. And also shall and will pay the sewers-rate, and all manner of other taxes, assessments, rates, and impositions whatsoever, which now are, or hereafter, during the said term, shall be assessed, rated, or imposed on the said messuage or tenement and premises, or any part thereof, or on the said yearly rent hereby reserved, or any part thereof, or on the said [*mortgagee*] and [*mortgagor*], or either of them, their, or either of their executors, administrators, or assigns, on account thereof. And will also pay, on demand, unto the said [*mortgagee*] and [*mortgagor*] respectively, and their respective executors, administrators, and assigns, all premiums, costs, charges, and expenses, and all and every sum and sums of money

Covenants
by lessee;

to pay rent
to mortgagor
till notice,
and after-
wards to
mortgagee ;

to pay rates
and taxes ;

and pre-
miums of
insurance
effected by
mortgagee or
mortgagor.

which the said [*mortgagee*] and [*mortgagor*] respectively, or their respective executors, administrators, or assigns shall, from time to time, during the said term, expend for insuring the said messuage or tenement and premises, from loss or damage by fire, to the extent of — ; and that the amount of the said premiums, costs, charges, and expenses shall also be recoverable by distress on the said premises, as and in the nature of rent reserved upon a lease for years. And also, that in case any loss or damage by fire shall, during the said term hereby granted, happen to the said messuage or tenement and premises, or any part thereof, and the money received by the said

Limit of amount recoverable by distress.

If insurance money insufficient to repair damages, lessee to pay difference.

[*mortgagee*] and [*mortgagor*], or either of them, their, or either of their executors, administrators, or assigns, under or by virtue of the policy or policies of insurance thereon, shall not be sufficient, and so far as the same will not extend to rebuild, repair, or reinstate the said messuage or tenement, erections, and buildings, then the said [*lessee*], his executors, administrators, or assigns, shall and will also pay unto such of them, the said [*mortgagee*], and [*mortgagor*], or his executors, administrators, or assigns, as shall rebuild, repair, and reinstate the said messuage or tenement, erections, and buildings, the difference in amount between the sum recovered under or by virtue of the said policy or policies of insurance, and the sum expended in so rebuilding, repairing, and reinstating the said messuage or tenement, erections, buildings, and premises or any part thereof. And also, &c. [*add here a covenant by lessee to repair and cleanse, &c.*]. And the same messuage or tenement and premises, with the appurtenances, so being in all parts and things from time to time well and sufficiently repaired, upheld, sustained, &c. [*as in the covenant to repair*], shall and will peaceably and quietly leave, surrender, and yield up, at the end of the said term, unto the said [*mortgagee*], his executors, administrators, or assigns, in case his aforesaid mortgage shall be then subsisting, but otherwise to the said [*mortgagor*], his executors, administrators, or assigns; together with all such fixtures thereon or thereto belonging as are usually deemed landlord's fixtures. And further, that it shall be lawful for the said [*mortgagee*] and [*mortgagor*] respectively, and their respective

Covenant to repair; and to yield up at end of term.

executors, administrators, and assigns, and also for the superior landlord or landlords of the said messuage or tenements and premises, and his or their surveyor or surveyors, agents, or servants, twice in every year, &c. [here insert power to lessors to enter and see state of repairs of the premises, and a covenant by lessee to repair, according to notice]. And also, &c. [covenant by lessee not to carry on any offensive business, nor assign without license]. Provided always, &c. [add proviso for the re-entry of the mortgagee, his executors, administrators, and assigns; and also of the mortgagor, his executors, administrators, and assigns, on non-payment of rent, or non-performance of covenants; and a covenant by the mortgagor for the lessee's quiet enjoyment, on paying the rent reserved, and performing and observing the covenants by him to be performed and observed, and add], and also saved harmless and indemnified from the rent and covenants reserved and contained in a certain indenture of lease, bearing date on or about the — day of —, in the year —, and made, or expressed to be made, between —, of the one part, and the said [mortgagor] of the other part, whereby the said — did, for the considerations therein mentioned, demise and lease the said messuage or tenement and premises hereby demised, unto the said [mortgagor], his executors, administrators, and assigns, from the day of the date thereof, for the full term of forty years thence next ensuing; and free from all claims and demands in respect thereof. And also that he, the said [mortgagor], his executors, administrators, or assigns shall and will, in case of any loss or damage by fire happening to the said messuage or tenement and premises, immediately on receipt or recovery of the money due upon or by virtue of any policy or policies of insurance of the said premises, fully and faithfully lay out and expend the same, so far as the same will extend, in rebuilding, repairing, and reinstating the said messuage or tenement and premises hereby demised. And the said [mortgagee] doth hereby, &c. [insert covenant by the mortgagee for the lessee's quiet enjoyment on payment of rent, &c., as against him, the mortgagee, and persons claiming under him]. And the said [lessee]

Power of re-entry to inspect repairs, &c.
Not to carry on offensive businesses, nor assign without license.
Proviso for lessor's re-entry on non-payment of rent, &c.
Covenant by mortgagor for lessee's quiet enjoyment and indemnity against original lessor.

Covenant by mortgagor to expend insurance-money on repairs.

Covenant by mortgagee for lessee's quiet enjoyment.
Covenant by lessee to advance renewal fines;

doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagor*], his executors, administrators, and assigns, that in case the said — shall, at any time during the continuance of this present demise, be willing to renew the said lease, bearing date on or about the said — day of — for a further term of years, he, the said [*lessee*], his executors, administrators, or assigns, will, at the request in writing, of the said [*mortgagor*], his executors, administrators, or assigns, pay to the said —, or their proper officer duly authorized to receive the same, the fine that shall be imposed upon such renewal of the said last-mentioned lease, and also the expenses of the same renewal, so that such fine and expenses do not exceed together the sum of — of lawful money of —, and if the same fine and expenses together shall exceed that sum, then will, at such request as aforesaid, pay so much of the same fine and expenses as shall amount to that sum. And the said

not exceeding —

*Covenant by
mortgagor to
assign or
underlet
renewed
term to
lessee, for
securing re-
payment of
fines, &c.,
and interest.*

[*mortgagor*] doth hereby further, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, that upon payment of any such fine and expenses of renewal as aforesaid, or of such part thereof as aforesaid, by the said [*lessee*], his executors, administrators, or assigns, he, the said [*mortgagor*], his executors, administrators or assigns, shall and will immediately upon such renewal, at his or their own costs and charges, effectually assign or demise, at the option of the said [*lessee*], his executors, administrators, or assigns, the premises to be comprised in such renewed lease, with their appurtenances, unto the persons or person paying the same fine and expenses of renewal, or such part thereof as aforesaid, their or his executors, administrators, or assigns, for the term, or for all the term except the last day thereof, for which the same premises shall have been granted by such new lease, by way of mortgage, for securing the repayment to the said [*lessee*], his executors, administrators, or assigns, of the principal sum or sums so advanced or paid, for such renewal, fine, and expenses of renewal as aforesaid, with interest thereon, after the rate of — per centum per annum, and subject thereto, upon trust for

the said [mortgagor], his executors, administrators, and assigns, according to his right and interest in the premises, to be comprised in any such new lease.

In witness, &c.

NO. XIX.

Lease of a Cotton-Mill, Machinery, and Gear, &c., for a term of Years, the Lessors to have the option of purchasing at the end of the term.

This indenture, made the — day of —, in the year of Parties.
our Lord —, between [lessors], of —, of the one part,
and [lessee], of —, of the other part, witnesseth : That in Testatum.
consideration of the rents and covenants hereinafter reserved
and contained, and on the part of the said [lessee], his exec-
utors, administrators, and assigns, to be paid and per-
formed, he, the said [lessor], doth by these presents demise
and lease unto the said [lessee], his executors, administra-
tors, and assigns, all that cotton-spinning mill, with the Parcels.
engine-house, steam-engine, boilers, machinery, running-
gear, fixtures, and other the appurtenances thereto respec-
tively belonging of him, the said [lessor], as the same
premises are now used and let in the way of room and
power, to the said [lessee] ; and also all those several
buildings used and occupied by the said several occupiers
of the said mill, as storehouses or otherwise, and all the
vacant ground adjoining or near the said premises ; and
also all those twelve tenements or cottages, situate and ad-
joining near to the said mill, and now in the several occu-
pations of —, &c., or some or one of them ; all which
premises are situate at or near —, in the town of —
aforesaid, and are called or known by the name of The
Lower Mill ; together with all houses, out-houses, edifices,
buildings, roads, ways, paths, passages, watercourses,
pumps, and wells of water, culverts, and especially the
culvert or tunnel by which the said mill and engine are
supplied with water from the adjoining brook or rivulet,
easements, privileges, rights, members, and appurtenances
whatsoever to the same premises, or any part thereof,

**Exceptions
of mines,
and right of
working,**

**on payment
for damage
to lessee ;
and reserv-
ing right of
entry to in-
spect pre-
mises.**

Habendum.

**Subject to
chief rent,
&c.
Reddendum
of fixed rent
except in
case of fire;**

quarterly.

**Covenant by
lessee to pay
rent except
in case of
fire.**

belonging or appertaining, or now used and occupied therewith. Except and always reserved out of this present demise unto the said [*lessor*], his heirs, and assigns, all mines of coal, iron, lead, or other minerals, and all quarries of stone or slate, and beds of clay, within or under the said demised premises, with liberty for him and them, and his and their agents and workmen, at all times during this demise, to dig for, get, smelt, and work any such mine, minerals, quarries, and beds of clay, and to lead and carry away the same with carts and carriages over any part of the said demised premises, making reasonable compensation to the said [*lessee*], his executors, administrators, or assigns, for the damage he or they may thereby sustain; and also saving and reserving unto the said [*lessor*], his heirs, or assigns, and his or their agent or agents, the liberty of entering upon the said premises hereby demised, four times in the year, at seasonable times in the daytime for the purpose of viewing the state and condition thereof. To have and to hold the said mill, engine-house, steam-engine, machinery, running-gear, fixtures, cottages, buildings, vacant ground, hereditaments, and all and singular other the premises hereby demised, or intended so to be, with their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, from the — day of — last past, for the term of seven years thence next ensuing (subject to the payment of the yearly chief rent of —, hereinafter particularly mentioned); yielding and paying therefor, yearly and every year during the said term (except only in case of fire, as herein-after mentioned), for and in respect of the said premises, unto the said [*lessor*], his heirs, and assigns, the clear yearly rent of —, of lawful money of —, by four equal quarterly payments, on the twenty-fourth day of June, the twenty-fourth day of September, the twenty-fourth day of December, and the twenty-fourth day of March, in each year; the first payment to begin and be made on the twenty-fourth day of June now next ensuing. And the said [*lessee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessor*], his heirs, and assigns, that he, the said [*lessee*], his executors, administrators, or assigns, shall and will, during the said term (except only in case of fire, as herein-after

mentioned), well and truly pay unto the said [*lessor*], his heirs, and assigns, the said yearly rent of —, at the days and in manner hereinbefore appointed for payment thereof. And also that he or they shall and will, over and besides the said yearly rent, during the said term, pay, satisfy, and discharge unto —, of —, his heirs, and assigns, the annual chief rent of —, payable to him and them out of the said demised premises on the — day of —, in each year; and also a certain outpayment, not exceeding — annually, to be payable on the same day to Messrs. —, of —, bankers, or such other person or persons as shall be entitled to receive the same, for the privilege of passing and continuing the culvert or tunnel hereinbefore mentioned under or through their property to the said brook; and shall and will save harmless the said [*lessor*], his heirs, executors, administrators, and assigns, from the same chief rent and outpayment respectively, and from all suits and damages in consequence of the non-payment thereof respectively. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will from time to time, and at all times during this demise, pay, satisfy, and discharge all township, county, and other taxes, rates, duties, and assessments whatsoever, that shall be taxed, rated, assessed, charged, or imposed upon, or in respect of, the said premises hereby demised, or any part thereof, or the owners or occupiers thereof. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will, at his and their own expense, during this demise when and so often as occasion shall require (damage by accidental fire only excepted), substantially maintain, point, glaze, paint, amend, and keep the whole of the said cotton-mill, engine-house, engine, machinery, running gear, cottages, and premises hereby demised, and the roofs, windows, doors, and wood and iron work thereof respectively, and all and singular the out-houses, stables, gates, walls, fences, watercourses, roads, and appurtenances whatsoever thereto belonging, in good, substantial, and complete tenantable repair and condition; and the same, so painted, amended, and kept in such complete repair and condition (reasonable wear and tear only excepted), shall and will, at the expiration or the sooner determination of this demise, peaceably and quietly surrender and yield up

To pay chief
rent;

and a yearly
sum to a
stranger, for
use of cul-
vert;

and indem-
nify lessor
therefrom.

To repair
except in
case of fire;

and quietly
yield up at
end of term.

To expend a certain sum in repairs within twelve months.

Proviso for re-entry on non-payment of rent, &c.

Lessee may remove newly erected engines at end of term, or be paid for them by lessor.

unto the said [*lessor*], his heirs or assigns. And also that he, the said [*lessee*], his executors, administrators, or assigns shall and will, within twelve months from the date hereof, lay out and expend the sum of ——, at the least, in substantial repairs of the said mill, to the satisfaction of the said [*lessor*], his heirs, or assigns ; and particularly shall and will paint the whole of the outside wood-work of the said mill, as part of such repairs. Provided always, that if it shall happen that the said yearly rent hereby reserved, or any part thereof, shall be behind by the space of twenty-one days next after any of the said days whereon the same ought to be paid as aforesaid, or if the said [*lessee*], his executors, administrators, or assigns, shall not, in all things, keep and observe all and every the covenants and agreements herein contained, on his or their part to be observed and kept, then it shall be lawful for the said [*lessor*], his heirs, or assigns into and upon the said demised premises, or any part thereof in the name of the whole to re-enter, and the same to have again, repossess, and enjoy, as in their first and former state. Provided also that if, during the continuance of this demise, the said [*lessee*], his executors, administrators, or assigns shall put up and erect in and about the said mill and premises hereby demised, any shafts, machinery, or fixtures, other than what are now there, and which are particularly mentioned and described in the schedule thereof indorsed on these presents, he or they shall be at liberty, on the expiration or other sooner determination of this demise, either to remove the same (making good any damage to be occasioned by such removal), or at the option of the said [*lessor*], his heirs, or assigns, be paid by him or them such sums of money for the same as two indifferent persons, one to be chosen by each party, or their umpire shall award and affix. Provided also that unless the said [*lessor*], his heirs, or assigns, shall omit to give to the said [*lessee*], his executors, administrators, or assigns, three calendar months' notice in writing, previously to the expiration or other sooner determination of the said term (such notice to be left at the said mill), expressing his or their intent to become the purchaser or purchasers thereof, he or they shall be deemed to have declined such purchase. And the said [*lessor*] doth hereby, for him-

self, his heirs, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, that he or they paying the rent and performing the several covenants and agreements hereinbefore reserved and contained, and on his and their part to be paid and performed, shall and may peaceably and quietly have, hold, occupy, use, and enjoy the said premises hereby demised, with their appurtenances (especially the said culvert or tunnel for supplying the said mill with water), during the said term hereby granted, without any interruption, suit, or disturbance from or by the said [*lessor*], his heirs, or assigns, or any person or persons claiming or to claim by, from, through, or under him, them, or any of them. Provided always, and it is hereby further declared and agreed, that in case the said mill, engine-house, steam-engine, machinery, fixtures, cottages, buildings, hereditaments, and all and singular other the premises hereinbefore described, or any part or parts thereof shall at any time or times during the said term hereby granted, happen to be destroyed or damaged by fire, so as to render the same unfit for the spinning of cotton, or uninhabitable, then and in such case the rent hereinbefore reserved for the same, or a just and proportional part thereof, according to the nature or extent of the injury sustained, shall be suspended or abated until the said premises shall have been rebuilt or repaired by the said [*lessor*], his heirs, or assigns, and be put in a fit state and condition for habitation, or for carrying on the spinning or manufacturing of cotton, for which the same demised premises are now used; and in case of any dispute or difference between the parties interested therein, with respect to the time of such suspension, or the amount of such abatement respectively, the same shall from time to time and at all times, be referred to the arbitrament and determination of three indifferent persons, to be named or chosen as aforesaid.

In witness, &c.

Covenant for
lessee's quiet
enjoyment.

Proviso for
suspension
of rent, in
case of fire,
till premises
restored by
lessor.

NO. XX.

Assignment of a Lease under Seal.

This indenture, made the — day of —, in the year 1844, between C. D., of —, merchant, of the first part, and E. F., of said city, merchant, of the second part Whereas in and by a certain indenture of lease, bearing date the — day of —, in the year 1844, made between A. B., of —, of the one part, and the said C. D., of the other part; he, the said A. B., for the considerations therein mentioned, did grant, lease, &c., all that certain messuage, &c. To hold unto the said C. D., his executors, administrators, and assigns, from the — day of —, in the year 1844, for and during the whole term of — years from thence next ensuing, and fully to be complete and ended, at and under the yearly rent of — dollars, payable, &c., as in and by the said indenture of lease on reference thereto, will more fully appear. Now this indenture witnesseth that the said C. D., for and in consideration of the sum of — dollars, lawful money of the United States, to him in hand paid by the said E. F., at or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said E. F., his executors, administrators, and assigns, all the said messuage or tenement and premises above mentioned, and every part and parcel thereof, with the appurtenances; and also all the estate, right, title, interest, term of years yet to come and unexpired, property, claim, and demand whatsoever of the said C. D., of, in, and to the same, and every part and parcel thereof, together with the said indenture of lease itself. To have and to hold the said messuage or tenement and premises above mentioned, and hereby granted and assigned, and every part and parcel thereof, with the appurtenances, unto the said E. F., his executors, administrators, and assigns, for and during all the rest, residue, and remainder yet to come and unexpired of the said term of years in and by the said indenture of lease granted, in as full, large, and

ample a manner, to all intents and purposes, as the said C. D., his executors, administrators, or assigns now holds, or may at any time hold, and enjoy the same, by virtue of the said indenture of lease. Subject, nevertheless, to the several rents, covenants, conditions, and agreements in the said indenture of lease reserved and contained.

In witness whereof, &c.

NO. XXI.

An assignment of a Leasehold Interest, by Deed-poll, indorsed on the Lease.

Know all men by these presents, that I, the within named C. D., for and in consideration of the sum of ——, of lawful money of the United States, to me in hand paid by G. F., of ——, gentleman, at or before the ensealing and delivery of these presents, the receipt whereof I do hereby acknowledge, have bargained, sold, set over, and assigned unto the said G. F., all and singular, the messuage or tenement, yard, garden, coach-house, stables, out-houses, and hereditaments, in and by the within written indenture demised or mentioned so to be, with their appurtenances, and also all that small garden, at the end of and adjoining to the aforesaid garden, with the summer-house and mount, which were leased or agreed to be leased to me, by the within named A. B., by agreement between us, dated the day next before the date hereof, for twenty-one years, or such other term as is therein mentioned, at the yearly rent of ——, lawful money aforesaid, payable quarterly, that is to say, ——, and also all my estate, right, title, interest, term of years, claim, and demand whatsoever, of, into, or out of the same messuage and other the premises, or any or either of them, or otherwise howsoever, together with the same indenture and agreement, and all the benefit thereof. To have and to hold the said messuage or tenement, buildings, garden, summer-house, mount, and other the premises hereby assigned or mentioned so to be, with the appurtenances, unto the said G. F., his executors, administrators, and assigns, from henceforth, for all the now

residue of the within mentioned term of twenty-one years, and of such other term or terms as I, the said C. D., now have or ought to have therein respectively, subject, nevertheless, to the rents, covenants, and agreements in the said indenture and agreement respectively reserved, and contained, and agreed upon, and which from henceforth, on the tenant's or lessee's part, are or ought to be paid, done, and performed.

In witness whereof, &c.

NO. XXII.

An Assignment of a Lease by Indenture indorsed thereon.

Parties

assign

term,

This indenture, made, &c., between H. H., of —, &c., of the one part, and J. J., of —, &c., of the other part, witnesseth: That for and in consideration of the sum of — dollars of lawful money of the United States, to him, the said H. H., in hand paid by the said J. J., at or before the sealing and delivery of these presents, the receipt whereof the said H. H. doth hereby acknowledge, he, the said H. H., hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer, and set over unto the said J. J., his executors, administrators, and assigns, all that the within mentioned messuage or tenement, dwelling-house, and premises, together with the appurtenances thereunto belonging. And all the estate, right, title, interest, term, and terms of years yet to come and unexpired, use, trust, property, privilege, claim, and demand whatsoever, both at law and in equity of him, the said H. H., of, in, and to the same or any part thereof, together with the said indenture of lease. To have and to hold the said messuage or tenement, dwelling-house, and premises, and also the within indenture of lease, unto the said J. J., his executors, administrators, and assigns, from the — day of — now last past, for and during all the unexpired residue of the term of —, by the within indenture of lease granted, free and clear of, and from all arrears of

rent rates, and taxes whatsoever, up to the said — day of — last. But subject, nevertheless, to the payment of the rent, and to the observance of all and singular the covenants, conditions, and agreements therein reserved and contained. And the said H. H. doth hereby, for himself his heirs, executors, and administrators, covenant, promise, and agree to and with the said J. J., his executors, administrators, and assigns, in manner following (that is to say), that he, the said H. H., shall and will well and truly pay, or cause to be paid, all the rent, taxes, charges, rates, and assessments due in respect of the said premises hereby assigned up to the — day of — last. And further, that he, the said H. H., hath not at any time heretofore made, done, committed, or executed, or willingly permitted or suffered any act, deed, matter, or thing whatsoever, whereby the said within indenture of lease, messuage, or tenement, dwelling-house, and premises hereby assigned, or any part thereof, are, is, can, shall, or may be impeached, charged, affected, or encumbered in title, charge, estate, or otherwise howsoever, and that for and notwithstanding any such act, deed, matter, or thing as aforesaid, the said within written indenture of lease is a good and effectual lease, valid in law; and that the rent and covenants therein and thereby reserved and contained, have been hitherto well and truly paid, kept, and performed. And that for and notwithstanding any such act, deed, matter, or thing as aforesaid, he, the said H. H., now hath in himself good right, full power and lawful and absolute authority to assign and assure the said premises hereinbefore mentioned, with the appurtenances, unto the said J. J., his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents. And also that he, the said J. J., his executors, administrators, and assigns, shall and may from time to time, and at all times hereafter during all the rest, residue, and remainder of the said term of —, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage or tenement, and dwelling-house and premises, with the appurtenances hereby assigned; and the rents, issues, and profits thereof, without the lawful let, suit, trouble, denial, eviction, or interruption of or by him, the said H. H., his heirs, executors,

subject to
the rents
and cove-
nants of the
lease.

Assignor
covenants
that he will
discharge all
debts, &c.,
up to the
time of the
assignment,
and that he
has not en-
cumbered
the estate,

and has
power to
assign.

For quiet
enjoyment
by assignee;

for further
assurance.

or administrators, or any other person or persons lawfully claiming or to claim from, by, under, or in trust for him, them, or either of them. And further, that he, the said H. H., his heirs, executors, administrators, and all and every person or persons lawfully claiming or to claim from, by, under, or in trust for him, them, any, or either of them, shall and will from time to time, and at all times hereafter, upon every reasonable request and at the costs and charges in the law of the said J. J., his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, and things, assignments, and assurances, in the law whatsoever, for the further, better, and more perfect and absolute assigning, assuring, and confirming the said premises, with the appurtenances, unto the said J. J., his executors, administrators, or assigns, for all the rest, residue, and remainder of the said term, as he or they, or his or their counsel in the law, shall reasonably advise and require. And the said J. J., for himself, his executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said H. H., his heirs, executors, and administrators, in the manner following (that is to say), that he, the said J. J., his executors, administrators, and assigns, shall and will from time to time and at all times, from the — day of —, during the residue of the said term of — years, well and truly pay, or cause to be paid, unto such person or persons as for the time being shall be entitled to receive the same, the yearly rent by the said indenture of lease reserved and made payable, and which from thenceforth shall grow due. And also well and truly perform, fulfil, and keep all and singular the covenants, clauses, provisos, and agreements in the said lease contained, and which, by and on the lessee's or assignee's part and behalf, is or are to be paid, observed, and performed, from the said — day of —. And also shall and will, from time to time and at all times, well and sufficiently save, defend, keep harmless and indemnified the said H. H., his executors, administrators, and assigns, from and against all costs, charges, damages, and expenses whatsoever, which they or any or either of them shall or may sustain, or become liable to, by reason or means of the said J. J., his executors,

Assignee
covenants to
pay rent;

to perform
the cove-
nants in the
lease.

administrators, or assigns, not paying all or any part of the said rent from time to time to become due, for or in respect of the said premises hereby assigned, from and after the said — day of —, or by reason or means of their not observing and fulfilling all or any of the covenants, provisos, and agreements in the said within written indenture of lease, reserved and contained, which by and on the part of the said J. J., his executors, administrators, and assigns, are to be observed, performed, fulfilled, and kept from thenceforth.

In witness whereof, &c.

NO. XXIII.

Assignment of the Wife's Term for Years by the Husband.

This indenture, made the — day of —, &c., between A. B., of —, and F. his wife (before her marriage F. T.), of the one part, and C. D., of —, of the other part. Whereas, by an indenture bearing date the — day of —, and made or expressed to be made between J. H., of the one part, and the said F. B. (then F. T.), of the other part, for the considerations therein mentioned the said J. H. did demise and lease unto the said F. B., her executors, administrators, and assigns all that messuage, &c., with the appurtenances, to hold the same unto the said F. B., her executors, administrators, and assigns from the — day of — then last past, for and during the full end and term of ninety-nine years from thence next ensuing, and fully to be complete and ended at, under, and subject to the rent, covenants, and agreements therein reserved and contained on the part of the said F. B., her executors, administrators, and assigns, to be paid, observed, performed, and kept; and whereas the said A. B., with the privity and approbation of the said F. his wife, hath contracted and agreed with the said C. D. for the absolute sale to him, the said C. D., of the said messuage or tenement, and all and singular other the premises comprised in the aforesaid in part recited in

Recites the
wife's title
to the term,

and the con-
tract of sale.

The consideration.

denture of lease, for the residue now to come and unexpired of the said term of ninety-nine years, at or for the price or sum of —. Now this indenture witnesseth: That in pursuance of the said agreement, and for and in consideration of the sum of —, of lawful money of the United States, to the said A. B. in hand well and truly paid by the said C. D., at or before the sealing and delivery of these presents (the receipt whereof he, the said A. B., doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said C. D., his heirs, executors, administrators, and assigns forever, by these presents), and also for and in consideration of the sum of five dollars of like lawful money, to the said F. B. in hand well and truly paid by the said C. D., at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged); he, the said A. B., with the privity and approbation of the said F. his wife (testified by her being a party to and sealing and delivering these presents), and also the said F. B. have, and each of them have bargained, sold, assigned, transferred, and set over, and by these presents do and each of them doth bargain, &c., unto the said C. D., his executors, administrators, and assigns the said messuage or tenement, and all and singular other the premises comprised in and demised by the said in part recited indenture, with their and every of their appurtenances, together with the said in part recited indenture, and the full benefit thereof. And all the estate, right, title, interest, term, and terms for years, property, possibility, claim, and demand whatsoever, both at law and in equity, of them, the said A. B., and F. his wife, or either of them, of, in, to, or out of the same premises, or any part thereof.

Habendum.

To have and to hold the said messuage or tenement, and all and singular other the premises hereby assigned or expressed and intended so to be, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, for and during all the residue and remainder now to come and unexpired of the said term of ninety-nine years, subject, nevertheless, to the payment of the rent and to the performance and observance of the covenants and agreements in the said in part recited indenture

reserved and contained, and which from henceforth, on the lessees' or assignees' part and behalf, are and ought to be paid, observed, and performed. And the said A. B., for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said C. D., his executors, administrators, and assigns by these presents, in manner following (that is to say), that for and notwithstanding any act, deed, matter, or thing whatsoever by him, the said A. B., or the said F. his wife, made, done, committed, or executed, or knowingly or willingly suffered to the contrary, the hereinbefore in part recited indenture of lease, at the time of the sealing and delivery of these presents, is a good and effectual lease and demise in the law of the said premises therein comprised, and the said term of ninety-nine years is not forfeited, merged, extinguished, surrendered, determined, or otherwise become void or voidable. And that for and notwithstanding any such act, deed, matter, or thing whatsoever as aforesaid, he, the said A. B., and the said F. his wife, or one of them, now have or hath in themselves, himself, or herself, good right, full power, and lawful and absolute authority to assign the premises hereby assigned, or expressed or intended so to be, with the appurtenances thereunto belonging, unto the said C. D., his executors, administrators, and assigns, for all the residue now to come of the said term of ninety-nine years in manner aforesaid, according to the true intent and meaning of these presents. And that it shall and may be lawful to and for the said C. D., his executors, administrators, and assigns, from time to time and at all times hereafter during the said term of ninety-nine years, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the premises hereby assigned, or expressed and intended so to be, with their appurtenances, and to have, receive, and take the rents, issues, and profits thereof and of every part thereof to and for his and their own use and benefit, without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of or by him, the said A. B., and the said F. his wife, or either of them, their or either of their executors or administrators, or by any other person or persons lawfully or equitably claiming or to claim by, from, or under or in

Covenants
by the hus-
band, that
he and his
wife have
good right
to assign.

for quiet
enjoyment.

trust for them, or any of them. And that free and clear, and forever discharged or otherwise by the said A. B., his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all estates, titles, troubles, charges, debts, and encumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said A. B., and F. his wife, or either of them, their or either of their executors or administrators, or by any person or persons lawfully or equitably claiming or to claim by, from, under, or in trust for them, or any of them. And further, that he, the said A. B., his executors and administrators, and all and every other persons or person having or claiming, or who shall or may have or claim any estate, right, title, interest, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or expressed and intended so to be, or any of them, or any part thereof respectively, by, from, or under, or in trust for him, the said A. B., and F. his wife, or either of them, their or either of their executors or administrators, shall and will from time to time and at all times hereafter during the said term of ninety-nine years, upon every reasonable request to be made for that purpose, by and at the proper costs and charges in the law of the said C. D., his executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, things, devices, assignments, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely assigning and assuring of the premises hereby assigned, or expressed and intended so to be, and every part thereof, with their appurtenances, unto the said C. D., his executors, administrators, and assigns, for the residue which shall be then to come of the said term of ninety-nine years, as by the said C. D., his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably devised, or advised and required. And also that he, the said A. B., his executors or administrators, shall and will pay the rent reserved by the aforesaid in part recited indenture of lease up to and including — day now next ensuing, and shall

And for payment of rent, and performance of covenants up to a given time.

and will keep indemnified the said C. D., his executors, administrators, and assigns, and his and their lands, tenements, goods, and chattels respectively, from the same rent, and from all costs and expenses on account of the non-payment thereof, or on account of the breach or non-performance of any of the covenants or agreements in the said in part recited indenture on the part of the said F. B., her executors, administrators, or assigns, to be performed from the commencement thereof. And the said C. D. doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the said A. B., his executors, administrators, and assigns that he, the said C. D., his executors, administrators, and assigns shall and will, at all times during the continuance of the said term of ninety-nine years, pay the yearly rent reserved by the aforesaid in part recited indenture of lease, from —— day of —— now next ensuing, and perform, fulfil, and keep all and every the covenants and agreements in the said indenture of lease contained, on the part of the tenant or lessee from henceforth to be performed, and from the same rent, covenants, and agreements and all costs and expenses on account of any breach, neglect, or default of, or in payment or performance thereof as aforesaid, shall and will save harmless and keep indemnified the said A. B., and F. his wife, and each of them, their and each of their executors and administrators, and their lands, tenements, goods, and chattels respectively.

In witness, &c.

Covenants
by assignee
for payment
of rent, and
performance
of covenants
after that
time.

NO. XXIV.

Lease by Husband and Wife, under a Power of Leasing.

This indenture, made, &c., between E. H., of ——, and G. his wife, of the one part, and C. B., of ——, of the other part, witnesseth: That pursuant to and in execution of a power to them, the said E. H., and G. his wife, for this purpose given or limited, in and by a certain indenture of release, bearing date the —— day of ——, made between the said E. H., of the first part, the said G. H.

Parties.
Witnesseth,
that pursu-
ant to the
power,

(then G. P., spinster), of the second part, and C. D. of the third part (being the settlement made previously to, and in contemplation of, the marriage then intended, and which was shortly afterwards duly had and solemnized between the said E. H., and G., now his wife), and of every or any other power or authority, in anywise enabling

and in consideration of the rent and covenants,

them in this behalf, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, on the part and behalf of the said C. B., his executors, administrators, and assigns, to be paid, observed, and performed; they, said E. H., and G. his wife, do, by this indenture, limit, appoint, and demise unto the said C. B., his executors, administrators, and assigns, all that, &c., (the parcels), together with all and singular houses, out-houses, tenements, hereditaments, and appurtenances whatsoever to the said messuage and premises

Habendum.

belonging, or in anywise appertaining: To have and to hold all and singular the premises hereinbefore limited, appointed, and demised, or intended so to be, with the appurtenances, unto the said C. B., his executors, administrators, and assigns,

For the term of twenty-one years,

for the term of twenty-one years, to be computed from the day of, &c., now last past, and thenceforth next ensuing, and fully to be complete and ended; yielding and paying yearly, and every year during the said term, unto the person or persons for the time being entitled to the said premises in reversion or remainder immediately expectant, on the said term of

at the yearly rent of \$800 dollars.

twenty-one years, the yearly rent or sum of \$800, lawful money of the United States of America, by equal quarterly payments, on the first days of March, June, September, and December, in every year, without any deduction or abatement whatsoever for or in respect of the land-tax, or any other present or future taxes, or any other matter or thing whatsoever; the first quarterly payment of the said yearly rent to be made on the first day of March next

Proviso for re-entry,

ensuing the day of the date of these presents; provided always, nevertheless, and these presents are upon this express condition, that if the said yearly rent, or any part thereof, shall be in arrear after the same ought to be paid as aforesaid, or if the said C. B., his executors, administrators, or assigns, shall, at any time or times during the continuance of this demise, transfer, or assign over, or

on non-payment of rent,

underlet, or agree to transfer, or assign over, or underlet to any person or persons whomsoever, the premises hereinbefore limited, appointed, or demised, or any part or parts thereof, for all or any part of the said term, without the license and consent, in writing of the person or persons for the time being entitled as aforesaid, for that purpose first had and obtained; or if the said C. B., his executors, administrators, or assigns, shall become bankrupt, or shall compound his or their debts, or assign over his or their estate and effects for payment thereof, or if any execution shall issue against him or them, or any of his or their effects whatsoever, whereupon the said premises, or any part thereof shall be taken or attempted to be taken in execution; or if the said C. B., his executors, administrators, or assigns, shall not, from time to time and at all times during the continuance of this demise, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements which, on his and their part, are and ought to be observed, performed, fulfilled, and kept according to the true intent and meaning of these presents; then, and in any of the said cases, it shall and may be lawful to and for the person or persons for the time being entitled as aforesaid, into and upon the said appointed and demised premises, or any part thereof in the name of the whole, to enter, and the same to have, retain, possess, and enjoy, discharged from these presents, and the limitation, appointment, and demise intended to be hereby made as aforesaid, anything herein contained to the contrary thereof in any wise notwithstanding.

And the said C. B. doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree with and to the person or persons for the time being entitled as aforesaid, in manner following, that is to say: that he, the said C. B., his executors, administrators, and assigns, shall and will well and truly pay, or cause to be paid, unto the person or persons for the time being entitled as aforesaid, the aforesaid yearly rent of \$800, on such days or times as are hereinbefore mentioned and appointed for the payment thereof; and also shall and will well and truly pay, bear, and discharge the land-tax, and all other taxes, charges, duties, or assessments what-

or by lessee's assignment;

or becoming bankrupt, or compounding debts;

or on breach of any covenants by lessee.

Covenants by lessee;

for payment of rent;

and taxes;

soever, either already taxed, charged, assessed, or imposed, or at any time or times hereafter, during the continuance of this demise, to be taxed, charged, assessed, or imposed, upon the said premises, or any part or parts thereof, or upon the person or persons for the time being entitled as aforesaid in respect thereof, as landlord or landlords of the same premises, by any competent authority whatsoever.

to repair the house;

And also shall and will, at his and their own costs and charges, well and substantially uphold, repair, support, and maintain the said messuage or farm-house, and all the barns, stables, and out-buildings thereunto belonging, and all the glass windows, glazing, and lead-work of the same messuage or farm-house and premises; and all locks, keys, hinges, bolts, bars, fixtures, pumps, and the running-gears, thereof; and all gates, stiles, pales, posts, bridges, hedges, ditches, drains, watercourses, and inward and outward fences of every kind, of or belonging to the said premises, or any part or parts thereof, at all times during the continuance of this demise, when need and occasion shall be or require, sufficient timber and fencing stuff being found by the person or persons for the time being entitled as aforesaid, within a reasonable distance from the place or places where the same shall be required to be used, such timber and fencing stuff to be cut and carried at the expense of the said C. B., his executors, administrators, or assigns; and the same messuage or farm-house, articles, things, and premises being so well and sufficiently uphelden, repaired, supported, and maintained, shall and will peaceably and quietly leave, surrender, and yield up to the person or persons entitled to the said premises, at the end of or sooner determination of the said term, together with such fixtures, materials, and things as are now, or shall at any time or times during the continuance of this demise, be set up and affixed within, upon, or about the said premises hereinbefore limited, appointed, and demised, or any part or parts thereof (reasonable use or uses thereof, and accident by fire only excepted).

sufficient allowances of timber;

and leave the same at the end of the term, with fixtures;

not to assign or underlet;

And also that the said C. B., his executors, administrators, or assigns, or any of them, shall not nor will, at any time or times during the continuance of this demise, transfer, assign over, or underlet to any person or persons

whomsoever the said premises hereinbefore demised, or any part or parts thereof, for all or any part of the said term of years, without the license or consent, in writing, of the person or persons for the time being entitled as aforesaid, for that purpose first had and obtained.

And also that he, the said C. B., his executors, administrators, and assigns, shall not, nor will, at any time or times during the continuance of this demise, plough, dig, break, or convert into tillage or garden-ground any of the fields, closes, pieces or parcels of meadow, pasture, and marsh lands, hereinbefore limited, appointed, and demised, or any part thereof respectively.

And also shall not, nor will, during the continuance of this demise, mow, or cause or suffer to be mowed, the fields, closes, pieces, or parcels of land hereinbefore demised, or any of them, or any part thereof respectively, more than once in a year during the three last years of this demise, nor permit or suffer the same, or any part thereof respectively, to be injured or damaged by heavy cattle during the continuance of this demise.

And also shall and will so manage and cultivate the arable lands (parcel of the said premises hereinbefore limited, appointed, and demised), at all times during the continuance of this demise, that no more than two successive crops of corn or grain, and those two not of the same kind, shall be had or taken from off the same, or any part or parts thereof, without giving the same a clear summer fallow, or sowing the same with turnips in the ensuing year, and with the next crop after such turnips, laying down the same land in a husbandlike manner, with a sufficient quantity of sound clover and other grass seeds, and continuing the same so laid down two years, to be computed from the midsummer day next after sowing the same seeds.

And also shall and will yearly, and every year during the said term, inbarn or stock on the said premises all the corn or grain which shall grow or arise therefrom, and there thresh the same, and feed and fodder cattle, or otherwise spend or consume on the said premises all the straw, chaff, and clover arising therefrom, and also all the hay and turnips that shall grow or arise from or upon the said premises hereinbefore demised, except the winter straw

plough up
any of the
field;

mow the
lands oftener
than once a
year;

or take
more than
two succes-
sive crops.

To inn the
corn upon
the premises,

and use the
straw, &c.,
there,

with excep-
tions.

that shall be wanted for thatching and daubing work ; also, except half the hay and clover which shall arise in the last year of this demise, and the whole of the straw and chaff arising from the corn in the said last year, which half of the hay, and the entirety of which straw and chaff, shall be left upon the said premises, for the benefit of the person or persons for the time being entitled as aforesaid, or his, her, or their succeeding tenant or tenants of the said premises ; which hay, however, is to be so left upon the premises only for the purpose of giving an option to such person or persons, his, her, or their succeeding tenant or tenants, so becoming the purchaser or purchasers thereof, at so much money as the same shall be reasonably worth in the judgment of two judicious persons, one of them to be chosen by the said C. B., his executors, administrators, and assigns, and the other of them to be chosen by the person or persons taking the same ; and in case such two persons so chosen shall disagree as to the amount of such valuation, then the same shall be referred to the valuation of a third judicious person, to be chosen by the two first chosen, and the valuation to be made shall be binding and conclusive upon all the said parties.

And also shall and will spend and lay, in a husbandlike manner, where the same shall be most wanted, all and every the dung, manure, muck, and compost that shall arise and be made during the continuance of this demise, from the hay, straw, clover, and turnips that shall be so spent and consumed on the said premises as aforesaid, except the dung, manure, and compost that shall arise and be made therefrom in the last year of this demise, and during the time that shall elapse between the end of this demise and the first day of May the next ensuing, and shall and will turn in heaps and leave in the yard, or some other convenient part of the said premises hereinbefore limited, appointed, and demised, the dung, manure, muck, and compost so excepted as aforesaid, except such part thereof as shall be used for preparing turnips for the benefit of the person or persons for the time being entitled as aforesaid, or his or their succeeding tenant or tenants of the same premises, without any allowance being made to him or them, in respect of the same.

**Landlord
and succeed-
ing tenant to
have an op-
tion to pur-
chase the
hay left at
a valuation**

**Also to spend
the dung
made during
the term on
the premises,**

**and so leave
the same.**

And also that he the said C. B., his executors, administrators, or assigns, shall and will yearly, and every year during the continuance of this demise, in a husbandlike manner, cut, scour, or cause and procure to be cut and scoured — yards of the fences and ditches upon such part of the arable land hereinbefore limited, appointed, and demised; and — rods of the fences and ditches upon such part of the marsh lands as shall most require cutting and scouring; and do or cause to be done all such outhawking, danking, and planting necessary for that purpose, being allowed bushes, thorns, and other fencing, sufficient, to be taken from the premises.

Also to scour
ditches and
cut fences.

Covenant by
husband
with lessee
for quiet
enjoyment.

And the said E. H. doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said C. B., his executors, administrators, and assigns, that he the said C. B., his executors, administrators, and assigns, paying the said yearly rent of \$800 hereinbefore reserved as the same shall become due and payable in the manner and form aforesaid, and well and truly observing, performing, fulfilling, and keeping all and singular the covenants and agreements hereinbefore contained, on his and their parts to be observed, performed, fulfilled and kept according to the true intent and meaning of these presents, shall or lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said messuage or farm-house, and other premises hereinbefore limited, appointed, and demised, or expressed and intended so to be, with their appurtenances, during the said term of twenty-one years, without the lawful let, suit, trouble, or hindrance of or by the person or persons for the time being entitled as aforesaid, or any person or persons whomsoever lawfully obtaining or to claim by, from, under, or in trust for such person or persons, or any of them.

In witness, &c.

NO. XXV.

Agreement for Lodgings.

Memorandum of an agreement entered into this —— day of ——, 1804, by and between A. B., of &c., and C. D., of &c., whereby the said A. B. agrees to let, and the said C. D. agrees to take the rooms or apartments following, that is to say: an entire first floor, and one room in the attic story or garrets, and a back kitchen and cellar opposite, with the use of the yard for drying linen, or beating carpets or clothes, being part of a house and premises in which the said A. B. now resides, situate and being in ——. To have and to hold the said rooms or apartments, and the use of the said yard as aforesaid, for and during the term of half a year, to commence from —— next after the date hereof, at and for the yearly rent of —— of lawful money of the United States, payable monthly, by even and equal portions, the first payment to be made on —— next ensuing the date hereof; and it is further agreed that, at the expiration of the said term of half a year, the said C. D. may hold, occupy, and enjoy the said rooms and apartments, and have the use of the said yard as aforesaid, from month to month, for so long a time as the said C. D. and A. B. may and shall agree at the rent of —— for each month, and that each party be at liberty to quit possession on giving to the other a month's notice in writing. And it is also further agreed between the said parties, that when the said C. D. shall quit the premises, he shall leave them in as good a condition and repair as they shall be in on his taking possession thereof, reasonable wear excepted.

As witness, &c.

NO. XXVI.

Agreement for Ready-Furnished Lodgings.

Memorandum of an agreement entered into this —— day of ——, in the year of our Lord ——, by and between A. B., of, &c., of the one part, and C. D. of, &c., of the other part, by which the said A. B. agrees to let to the said C. D.

a room or apartment up one pair of stairs forward, in his the said A. B.'s house, situate in — Street, in the — and county aforesaid, ready furnished; together with the use and attendance of his — servant in common with the other lodgers. And also the use of a cellar, at the rent of — of lawful money of the United States per month. And the said C. D. agrees to take the said room or apartment, with the use of the servant and cellar as aforesaid, at the rent aforesaid, and also to find and provide for himself all manner of linen, and china or crockery ware whatsoever, that he shall have occasion for, and that if he shall break or damage any part of the furniture of the said A. B. he will make good or repair the same, or pay him sufficient to enable the said A. B. to put the same in the same plight and condition as they now are in. And it is further agreed, that if either party shall quit or leave the premises, he shall respectively give or take a month's notice, in writing, to be computed from the date of the said notice.

As witness, &c.

NO. XXVII.

1. *Notice to quit by the Landlord to his Tenant from Year to Year.*

Please to take notice that you are hereby required to surrender and deliver up possession of the house and lot known as number —, in — Street, in the city of New York, which you now hold of me, and to remove therefrom on the first day of May next, pursuant to the provisions of the statute relating to the rights and duties of landlord and tenant.

Dated this — day of —, 1864.

A. B., *Landlord.*

To Mr. C. D.,

Tenant in possession of the premises above specified.

2. Notice to quit by the Tenant.

Please to take notice that on the first day of May next I shall quit possession, and remove from the premises I now occupy, known as house and lot number —, in — Street, in the city of New York.

Dated this — day of —, 1864.

Yours, &c.,

C. D.

To Mr. A. B.

3. Notice by Landlord where the Commencement of the Tenancy is uncertain.

Mr. C. D.:—

I hereby give you notice to quit and deliver up, on the — day of — next, the possession of the messuage or dwelling-house [*or “rooms and apartments,” or “farm-lands and premises”*], with the appurtenances, which you now hold of me, situate in the — of —, in the county of —, provided your tenancy originally commenced at that time of the year; or otherwise, that you quit and deliver up the possession of the said messuage, &c., at the end of the current year of your tenancy, which shall expire next after the end of one half-year from the time of your being served with this notice.

Dated the — day of —, 18 —.

Yours, &c.,

A. B.

To Mr. C. D.

4. Notice to the Tenant either to quit the Premises or pay Double Value.

Sir:—

I hereby give you notice to quit and yield up, on the — day of — next, possession of the messuage, lands, tene-ments, and hereditaments, which you now hold of me, situate at —, in the parish of —, and county of —, in failure whereof I shall require and insist upon double the value of the said premises, according to the statute in such case made and provided.

Dated this — day of —.

Yours, &c.,

A. B.

To C. D.

5. Notice to pay Rent, or surrender the Premises.

Please to take notice that you are indebted to me in the sum of —— dollars, for rent of the house and premises No. —, — Street, in the city of —, now occupied by you; and that I require the payment of said rent on or before the — day of — instant (*three days*), or the possession of said premises.

Dated this — day of —, 1864.

A. B., *Landlord.*

To Mr. C. D., *Tenant.*

6. Notice of Re-entry for Non-payment of Rent.

To Mr. C. D.:—

You will please to take notice, that I intend to re-enter upon the premises known as lot No. —, in — Street, in the city of —, in the State of —, demised by —, to —, and of which premises, or a portion thereof, you have possession, unless all arrearages of rent due thereon, are paid to me within fifteen days after service of this notice.

Dated the — day of —, 18—.

Yours, &c.,

A. B.

7. Affidavit of Service of Notice.

State of New York, county of Kings, ss. A. B., of the city of —, being sworn, says, that on the — day of —, 1865, he personally served a notice in writing, of which the annexed is a copy, upon C. D., of —, in said county, by delivering the same to him in person (*or*) by delivering the same to R. D., the wife of the said C. D., (*or*) to W. D., the son of the said C. D., a person of eighteen years of age and upwards, residing upon the premises mentioned in the said notice, (*or*) by affixing the same upon the front door of the premises mentioned in the said notice, or *other conspicuous part of the premises*, there being no person to be found upon or residing upon the said premises at the time of such service. A. B.

Sworn this — day of
—, 1864, before me, }

NO. XXVIII.

Surrender of a Term of Years.

To all to whom these presents shall come, I, W. E., of ——, send greeting.

Whereas, by indenture, &c. [*recite the lease*], now know ye that I, the said W. E., in consideration of ——, to me in hand paid by A. B., &c. (the receipt, &c.), do hereby for me, my, &c., surrender and yield up, from the day of the date hereof, unto the said A. B., his, &c., the said indenture of lease, and all the messuage and premises aforesaid, and the term of years therein yet to come, with all my right, title, and interest thereto, and which I have or claim, or hereafter can or may have or claim, either by virtue of said indenture, or otherwise howsoever; and that free and clear, and freely and clearly, &c. [*against encumbrances*].

In witness, &c.

NO. XXIX.

Surrender of a Lease for Lives.

Parties.

To all to whom these presents shall come, A. B., of ——, and C. his wife (before her marriage, C. D., spinster), send greeting.

Recites the
lease in-
tended to
be surren-
dered.

Whereas W—— S——, of ——, by an indenture of lease under seal, bearing date the —— day of ——, did grant, demise, and lease unto the said C. B. (then C. D., spinster) all that messuage, &c., (the parcels), to hold the same with the appurtenances, unto the said C. B., her heirs and assigns, from the —— day of ——, for and during the natural lives of E. F. and I. K. and the life of the survivor or longer liver of them, at and under the yearly rents, and subject to the covenants and agreements therein reserved and contained, and on the part of the tenant or lessee to be paid, observed, and performed. And whereas the said E. F. hath departed this life; and whereas the said A. B., and C. his wife, being desirous of obtaining a renewal of

The death of
one of the
lives, agree-
ment to
renew,

the aforesaid lease, in consequence of the death of S—, to grant a new lease of the said demised premises, and the said E. F., have applied to and requested the said W—, which the said W— S— has agreed to do upon having the said recited indenture of lease, and the premises hereby demised, surrendered, and given up in manner herein-after mentioned ; and whereas, by an order of the Court of Chancery, bearing date the — day of —, and made on the petition of the said A. B., and C. now his wife, it is ordered (*here recite the order*) ; Now these presents witness, that in pursuance of the aforesaid agreement, and in obedience to the aforesaid order, and for and in consideration of the sum of ten dollars of lawful money of the United States to the said A. B., and C. his wife paid by the said W— S—, at or immediately before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), they, the said A. B., and C. his wife, have and each of them hath surrendered and yielded up, and by this present deed do and each of them doth surrender and yield up unto the said W— S— the said messuage or tenement and premises hereinbefore described, and comprised in the aforesaid in part recited indenture of lease, with the appurtenances ; and also the said recited indenture of lease. And all the estate, right, title, interest, claim, and demand whatsoever of them, the said A. B., and C. his wife, or either of them, of, in, to, and out of the same premises, and every part thereof. To the end that all the subsisting estate and interest under the said indenture of lease, of and in the said demised premises, may merge and be extinguished in the inheritance of the same premises, and to the intent and in confidence the said W— S— shall and do grant a new lease of the same premises, pursuant to the aforesaid order.

In witness, &c.

Sealed and delivered }
in the presence of }

and the order
of the court
directing the
surrender.

Husband
and wife sur-
render

the demised
premises

and lease to
the said
W. S.,

to the intent
that a new
lease may be
granted.

NO. XXX.

*A Surrender for the purpose of a Merger, Indorsed.***Parties.**

To all to whom these presents shall come, the within-named A. B., executor of the last will and testament of B., his late wife, deceased, which said B. was formerly the wife and afterwards the widow and sole executrix named in the last will and testament of the within named C. C., and D. D., and E. his wife, send greeting.

Recites the lease to be surrendered.

Whereas the said D. D., and E. his wife, have agreed to pay off and discharge the principal and interest due, and to grow due to the said A. B., as executor, as aforesaid, on the within written indenture, and the term of — years in the premises herein comprised is intended shortly to be assigned and transferred unto the said D. D., and E. his wife, or unto such person and persons, for such intents and purposes as he, the said D. D., and E. his wife, shall direct and appoint; but previous thereto the said D. D., and E. his wife, are desirous of having the within-mentioned premises, and the within-mentioned term of — years, assigned and surrendered to them, in order to merge the same in the freehold and inheritance of the same premises, and for that purpose have applied to the said A. B., who hath agreed to assign and surrender the same accordingly.

Surrender the term that it may merge.

Now these presents witness, that, in pursuance of such agreement, and for and in consideration of the sum of five shillings, to the said A. B. in hand well and truly paid by the said D. D., and E. his wife (the receipt whereof is hereby acknowledged), he, the said A. B. hath granted, surrendered, and yielded up, and doth hereby, &c., unto the said D. D., and E. his wife, her heirs, and assigns, all, &c., and premises comprised in the within written indenture, and therein mentioned to be hereby assigned to the said A. B., with their appurtenances, and all the estate, interest, use, trust, property, claim, and demand whatsoever, either in law or in equity, of him, the said A. B., of, into, or out of the said hereditaments and premises, and to the said term of — years, to the intent that the said term of — years may be merged and extinguished in the freehold and inheritance of the hereditaments and premises hereby

surrendered or mentioned, or intended so to be, and the remainder now to come and unexpired of such term of — years, of and in the premises assigned to the said A. B., may merge, and become determined, and utterly extinguished in the reversion, fee-simple, and inheritance of the same premises. [Add a covenant from A. B. that he hath not encumbered.]

NO. XXXI.

A Surrender of a Term (Part of the Leased Premises having been destroyed by Fire), Indorsed on the Lease.

Whereas the within-mentioned messuage or tenement hath been lately burnt down and destroyed by fire, and the within-named A. hath requested the within-named B. and C. to surrender to him, the said A., the site or parcel of ground whereon the said messuage or tenement lately stood, for all the residue and remainder of the said term of — years, by the said within written indenture granted therein, now to come and unexpired, to the intent that the same residue may merge and be extinguished in the estate and interest of him, the said A., in the same premises respectively, which they, the said B. and C., have consented and agreed to do; now these presents witness, that in compliance with the said request of the said A., and also for and in consideration of —, to the said B. and C. paid by the said A. (the receipt, &c.), they, the said B. and C. have surrendered and yielded up, and by these presents do, &c., unto the said A., his executors, administrators, and assigns, all that the said site, &c., and all the estate, &c.; to have and to hold the said site, &c., and all and singular other the premises hereby surrendered and yielded up, or intended so to be, with their and every of their appurtenance, unto the said A., his executors, administrators, and assigns, from henceforth, for and during all the rest, residue, and remainder of the said term of — years, by the said within written indenture granted therein, now to come and unexpired, to the intent and purpose

that the same residue may merge and be extinguished in the estate and interest of him, the said A., in the said premises respectively.

In witness, &c.

NO. XXXII.

SUMMARY PROCEEDINGS TO REMOVE A TENANT.

1. *Notice to pay Rent, or Surrender Possession.*

To C. D.:—

Take notice that you are indebted to me, in the sum of — dollars, for rent of the house and lot known as No. — in — Street, in the town of —, now occupied by you; and that unless said rent be paid on or before the — day of — instant (*three days' notice*), I shall proceed to take possession of the said premises.

Dated, &c.

Yours, &c.,

A. B., *Landlord.*

2. *Notice to Quit.*

To C. D.:—

Take notice, that you are required to surrender and deliver up the possession of the house and lot known as No. — in — Street, in the city of —, which you now hold of me; and to remove therefrom on or before the — day of — next (*one month's notice*), pursuant to the statute in such case made and provided.

Dated, &c.

Yours, &c.,

A. B., *Landlord.*

3. *Affidavit of Service of Notice.*

State of New York, county of —, ss. E. F., of —, in said county, being sworn, says: that on the — day of —, 18—, he served a notice, in writing, of which the foregoing is a copy, upon C. D., of —, by delivering said notice to and leaving the same with him, at —, in said town (*or*, by delivering said notice to, and leaving

the same with, A. D., the wife of the said C. D.) (*or* with L. D., the son of the said C. D., of mature age), residing on the premises mentioned in said notice.

Sworn, &c.

E. F.

4. *Affidavit of Landlord to remove a Tenant holding over.*

State of New York, county of Kings, *ss.* A. B., of the city of Brooklyn, being sworn, says that on the — day of —, 1863, he let and rented to C. D. the house and lot known as No. —, — Street in said city (*or some other intelligible description of the premises*), for the term of one year from the first day of May then next, and that said term has expired. And he further says that the said C. D. (*or* E. F., the assignee or under-tenant of the said C. D.) holds over and continues in possession of the said premises, without the permission of this deponent, his landlord.

Sworn, &c.

A. B.

5. *Affidavit when made by an Agent.*

State of New York, &c., *ss.* G. H., of the city of Brooklyn, being sworn, says he is the agent of A. B., the landlord of the premises hereinafter described, and is authorized to institute proceedings for the removal of C. D. therefrom. That, on the — day of —, he, as the agent of the said A. B., let and rented (&c., as in the former affidavit).

6. *Affidavit where there has been a Change of Ownership.*

State of New York, &c., *ss.* A. B. and C. D., both of the city of Brooklyn, being severally sworn, depose and say, and each for himself saith, and, first, the said A. B. saith, that, on the — day of —, he let and rented (*or as the agent of L. M.*, the then owner of the premises, let and rented) the house and lot known as No. —, — Street in said city, to G. H., for the term of one year from the first day of May then next, and that said term has now expired. And the said C. D. for himself saith that, on the — day of — (*some day subsequent to the*

demise), the said L. M. sold and conveyed the said premises to this deponent (*or* that, at the time of the said letting, the said premises were subject to a mortgage, and that proceedings were subsequently taken to foreclose the said mortgage, and the premises were ordered, by the — Court of —, to be sold at auction by the sheriff of the county of Kings, who on the — day of — sold and conveyed the same to this deponent), and that the said G. H., the tenant (and J. K., his assignee or under-tenant), had due notice thereof, and that deponent is now the owner and landlord of the said premises; and he further saith, that the said G. H. (*or* J. K., his assignee or under-tenant) holds over, and continues in possession of the said premises, after the expiration of his term, without the permission of this deponent, his landlord.

Sworn, &c.

A. B.

C. D.

7. *Affidavit in Case of Tenancy at Will.*

State of New York, &c., ss. A. B., of the city, &c., being sworn, says that, on or about the — day of —, 1864, he let and rented to C. D., during the will and pleasure of this deponent, the house and lot, &c. (*an intelligible description of the premises*), and that the said C. D. has held and occupied the said premises, as tenant at will to this deponent, from that period until the expiration of such tenancy, as hereinafter mentioned (*or* that since the — day of —, in the year —, C. D., of the same place, has held and occupied the house and lot in the — of —, on — Street, where the said C. D. now resides, as the tenant of this deponent, and at his will, and without any certain time agreed on for the termination of said tenancy). And he further says, that, on the — day of —, 1865, he caused to be served upon the said C. D., in due form of law, a notice in writing requiring the said C. D. to remove from the said premises, on or before the — day of —, 1865. That the time within which the said C. D. was so required to remove has expired, but that he still holds over, and continues in possession of the said premises, after the expiration of such time, without the permission of this deponent.

Sworn, &c.

A. B.

8. *Affidavit in Case of Non-payment of Rent.*

State of New York, &c., ss. A. B., of the city, &c., being sworn, says that, on the — day of —, 1865, he let and rented to C. D. the house and lot known as No. —, — Street, in the said city (*or other description of the premises*), for the term of two years from the first day of May last past, at an annual rent of — dollars, payable quarterly on the usual quarter-days. That the said C. D. is now justly indebted to this deponent in the sum of — dollars for the quarter's rent of said premises which fell due on the first day of — instant, pursuant to the terms of¹ the agreement under which the said premises are held as aforesaid. That on the day last mentioned he, in due form of law, demanded the payment of the said quarter's rent of the said C. D. (*or that he caused a notice in writing to be served upon the said C. D., in due form of law, on the — day of —, 1865, requiring the payment of the said rent to be made to this deponent on the — day of — instant (three days' notice), or the possession of the said premises*), but that the said rent has not been paid, or any part thereof, and the said C. D. holds over, and continues in possession of the said premises, after default in the payment of such rent as aforesaid, and without the permission of this deponent.¹

Sworn, &c.

A. B.

9. *Justices' Summons.*

To C. D., of —, in the county of —, and any other person in the possession or claiming the possession of the premises hereinafter described.

Whereas, A. B., of —, has made oath in writing, and presented the same to me, That, &c. (*here set forth the facts contained in the affidavit*). Therefore, you are hereby required forthwith to remove from the said premises, or show cause before me at my office, in the — in said city, on the — day of — instant, at — o'clock,

¹ Each of these affidavits, 7 and 8, should be accompanied by the affidavit of the person who served the notice.

A. M., why possession of the said premises should not be delivered to the said landlord.¹

Witness my hand, this —— day of ——, 1865.

J. Q. A., *Justice.*

10. *Affidavit of the Service of the Summons.*

State of ——, county of ——, ss. A. B., of ——, being sworn, says that, on the —— day of ——, 18—, at — o'clock, — m. at, &c. (*stating the place of service*), he personally served the within (*or annexed*) summons upon C. D., of ——, therein named, by delivering a true copy thereof to him in person, and at the same time showing him the original summons (*or* by leaving a copy thereof at the place of residence of the said C. D., with R. D., the wife of the said C. D. (*or* with E. D., the daughter of the said C. D., aged — years and upwards, residing on the said premises)), and showing her the original summons, and that, at the time of such service, the said C. D. was absent from his said place of residence), (*or* by affixing a true copy thereof upon the outside of the front door of the dwelling-house on the premises described in said summons, the said C. D. being then absent from his place of residence, and that no person of mature age residing thereon could be found there).²

Sworn, &c.

A. B.

11. *Warrant to put the Landlord in Possession.*

The People of the State of New York to the Sheriff of the county of Kings (*or* to any one of the constables of the town of ——, or marshals of the city of ——, in the county of ——), greeting: —

Whereas A. B., of ——, made oath in writing and presented the same to me (*reciting the facts contained in the affidavits*). Whereupon I issued a summons, requiring the said C. D., and any other person in the possession

¹ A copy of § 3 of ch. 828 of the laws of 1868 is required to be written or printed upon the outside of every copy of the summons left, in the absence of the tenant, with a person of mature age residing on the premises. Laws of New York of 1868, p. 1930.

² For further particulars as to this affidavit, see § 722 and note.

or claiming the possession of the premises above described, forthwith to remove from the said premises, or show cause before me, at my office in the —, on the — day of — instant, at — o'clock, A. M., why the possession of said premises should not be delivered to the landlord; and no sufficient cause having been shown to the contrary, and I, being satisfied by due proof of the service of the said summons, do therefore command you to remove all persons from the said premises, and to put the landlord, the said A. B., into the full possession thereof.

Witness my hand, this — day of —, 1865.

J. Q. A., *Justice, &c.*

Or, if there has been a trial, then, after the words "should not be delivered to the landlord," add, instead of the concluding part of the above warrant, as follows:—

And whereas the said C. D., by his affidavit filed with me, denied the facts or some of them, upon which the said summons was issued, and thereupon the issue so joined was tried by me; and, after hearing the evidence of the parties, I rendered a verdict in favor of the said A. B. (*or* before a jury duly nominated by me, and summoned for that purpose, who, after hearing the evidence of the parties, rendered a verdict in favor of the said A. B.) ; to wit, that the possession of the said premises should be delivered to the said A. B., whereupon judgment was rendered by me in favor of said A. B., against the said C. D., in pursuance of such decision or verdict that the possession of the said premises should be delivered to the said A. B. Now therefore you are hereby commanded to remove all persons from the said premises, and to put the landlord, the said A. B., into the full possession thereof.

Witness my hand, this — day of —, 1865.

J. Q. A., *Justice, &c.*

12. Notice of Appeal from the Justices' Court.

IN JUSTICES' COURT.

A. B., Respondent,	}	SUMMARY PROCEEDINGS.
against		

C. D., Appellant.

To A. B., above named, and to J. Q. A., Esq., Justice, ss.

Please to take notice, that I appeal to the County Court of the county of ——, from the judgment rendered against me on the —— day of ——, 1865, before J. Q. A., Esq., in favor of the said A. B., under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases, in which judgment costs were included, amounting to —— dollars, and that the grounds upon which said appeal is founded are as follows: (*state all the grounds of the appeal fully*).

Dated, &c.

Yours, &c.,

C. D.

13. Undertaking an Appeal.

The above-named C. D., having appealed to the County Court of —— county, from the judgment rendered against him on the —— day of —— last, before ——, Esq., in favor of the said A. B., under the provisions of the statute authorizing summary proceedings to recover possession of land in certain cases, and in which judgment costs were included, amounting to —— dollars. Now, in order to stay the execution of the said judgment, we, D. K. and R. K., do undertake and promise, to and with the said A. B. that if judgment be rendered against the said C. D., or the said appeal and execution thereon be returned unsatisfied in whole or in part, we will pay the amount unsatisfied. (*When the appeal is by the tenant, add*) And we do further undertake and promise, to and with the said A. B., that C. D. shall pay all rent accruing, or to accrue, upon the premises, the possession of which is sought to be recovered by the said A. B. in the proceeding before the said justice, subsequent to the application to said justice; and that, in default thereof, we will pay the same.

In witness whereof we have hereunto set our hands and seals, this — day of —, 18—.

D. K. (L. s.)
R. K. (L. s.)

I approve of the above undertaking, and of the sureties herein specified.

Dated, &c.

J. D., *County Judge.*
or J. W. G., *Justice Sup. Ct.*

14. *Certiorari of the Proceedings.*

The People of the State of New York to J. D., County Judge of the county of — (or J. R., Esq., [Seal] Justice of the Peace of the town of —, in the county of —), greeting:

Whereas we have been informed by the complaint of C. D. that certain proceedings were had before you, on behalf of A. B., against the said C. D., under the statute authorizing summary proceedings to recover the possession of land in certain cases, whereby (*set forth the order or proceeding complained of*), and we being willing, for certain reasons, to be certified of such proceedings, if any such were had before you, do command, and strictly enjoin you, that you certify and return those proceedings, with all things appertaining thereto, unto our justices of our Supreme Court of Judicature, at the Court House in —, on the — day of — next, under your hand, as fully and amply as the same remain before you; so that our said justices may further cause to be done thereupon what of right and according to law ought to be done; and have you then and there this writ.

Witness, J. W. G., Justice of the Supreme Court at —, the — day of —, 18—.

C. W. T., *Clerk.*

C. & S. Condit, *Attorneys.*

[*Indorsed*]

By the Court,

C. W. T., *Clerk.*

15. *Writ of Restitution.*

The People of the State of New York to the Sheriff of the county of —, greeting :

Whereas C. D., of —, in said county, by certain proceedings had before —, under the provisions of the statute authorizing summary proceedings to recover the possession of land in certain cases, was removed from the possession of (*describing the premises*), and which proceedings we caused to be removed into our Supreme Court of Judicature, by our writ of *certiorari*; and whereupon it was considered in our said court before our said justices, that the said C. D. should be restored to the possession of the said premises whereof the said C. D. is evicted, as appears to us of record.

Now, therefore, we command you forthwith to restore the said C. D. to the full possession of the said premises; and how, and in what manner you shall have executed this writ, make appear to our said Supreme Court at —, on —, and have then and there this writ.

Witness, J. W. G., Justice of the Supreme Court at —, the — day of —, 18 —.

C. W. T., *Clerk.*

C. & S. Condit, *Attorneys.*

[*Indorsed*]

By the Court,

C. W. T., *Clerk.*

NO. XXXIII.

IN FORCIBLE ENTRY AND DETAINER.

1. *The Complaint and Affidavit.*

To J. D., Esq., County Judge of Kings county : —

The complaint of A. B., of the city of Brooklyn, in the county of Kings, respectfully shows, That on the — day of —, 1866, C. D., of said city, unlawfully made a forcible entry into and upon the lands and tenements of this complainant, situated in said city (*or county*), and particularly described as follows (*here insert*). That the said

C. D. did then and there violently, forcibly, and with strong hand eject and expel this complainant from the said premises (*or hold the complainant out of the possession of the said premises*). That at the time above specified, this complainant had and still has an estate of freehold (*or for a term of years, &c.,*) in the said premises then subsisting, and that the said C. D. still unlawfully and forcibly holds and detains the same from this complainant.

Dated the —— day of ——, 1866. A. B.

County of Kings, ss. A. B., of said county, being sworn, says the foregoing complaint, by him subscribed, is true of his own knowledge.

Sworn this —— day, &c. A. B.

2. Precept for a Jury.

The People of the State of New York to the Sheriff, or to any constable of the county of ——, greeting: You are hereby required to cause to come before me, at my office in ——, &c., on the —— day of —— instant, at —— o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law to serve as jurors, to inquire upon their oaths for the said people of a certain forcible entry, made by C. D., as is said, into the lands and tenements of A. B., in the city of ——, in said county (*or of a certain forcible holding out of possession of A. B. by C. D. of the lands and tenements of the said A. B. in the city, &c.*), against the form of the statute in such case made and provided.

Given under my hand this —— day of ——, 1866.

J. D.,

County Judge of Kings County.

3. Notice to the Defendant.

To C. D., of ——, in the county of ——:

You are hereby notified that A. B., of the city of ——, in the county of ——, has presented to me his complaint, accompanied by an affidavit duly verifying the same, stating that you did, on &c. (*here state the substance of the complaint in full*), and that I have this day issued my precept,

directed to the sheriff or to any constable of the said county requiring him to cause to come before me, at my office, &c., on the —— day, &c., at —— o'clock in the forenoon, twenty-four inhabitants of the said county, duly qualified by law, to serve as jurors, to inquire upon their oaths of the forcible entry (*or* forcible holding out), as aforesaid.

Dated this —— day of ——, 1866.

J. D.,
County Judge of Kings County.

4. Affidavit of Service of the Notice.

County of Kings, ss. H. D., of the city of Brooklyn, being sworn says, That on the —— day of ——, 1866, he personally served a notice in writing, of which the annexed is a copy, upon C. D., of ——, in the county of Kings, by delivering the same to him in person (*or* by delivering the same to A. D., the wife of the said C. D., on the premises described in the said notice; and that such service could not be made upon the said C. D., for the reason that after diligent inquiry made by me, he could not be found, *or* by affixing the same on the front door of the house upon the premises described in said notice, there being no person of proper age on the premises; and that such service could not be made upon the said C. D., for the reason that, after diligent inquiry made by me, he could not be found).

Sworn this —— day, &c.

H. D.

5. The Inquisition.

An inquisition taken before J. D., County Judge of Kings county, at his office in, &c., on, &c., by the oaths of B. D., &c. (*insert the names of the jurors who concur*). The undersigned, inhabitants of the county of Kings, duly qualified to serve as jurors, having been summoned to inquire of the forcible entry (*or* holding out) hereinafter mentioned, and having appeared at the time and place aforesaid before the said County Judge, and having been by him duly sworn to inquire into the said forcible entry (*or* holding out) complained of by A. B. against C. D., and to make a true inquisition thereof, and having then and

there proceeded to make inquiry, and examine witnesses on oath, then and there administered by the said County Judge, do now here make this their inquisition as follows, to wit:—

The undersigned jury have found, and do hereby find and present, That A. B., of — aforesaid, long since had an estate of freehold (*or for a term of years, &c., as the fact may be*) in that certain piece of land situate in the city of —, in the said county, described as follows (*insert as in the complaint*), and that he was long since peaceably and lawfully possessed of the same, and that such estate and possession of the said A. B. so subsisted and continued until C. D., of —, on the — day of —, 1866, at — aforesaid, did forcibly and unlawfully, and with strong hand, enter into the said land and premises, and eject and expel him, the said A. B., therefrom; and the said A. B., so expelled from the said land and premises, from the day last aforesaid until the day of taking this inquisition, unlawfully and forcibly and with strong hand did keep out, and does yet keep out, to the great disturbance of the people of the State of —, and contrary to the form of the statute in such case made and provided, and that the estate of the said A. B., as aforesaid, still subsists therein.

And the jurors aforesaid do, on the evidence produced before them, find the inquisition aforesaid to be true.

(Signatures of jurors.)

If the jurors should find that the entry was made in a peaceable manner, and that, after such entry, the possession was held by force, the inquisition will be varied so as to state the forcible holding-out, instead of the forcible entry.

6. *Award of Restitution after Inquisition.*

The People of the State of New York,
on the relation of A. B.,
against
C. D.

The jury summoned and sworn to inquire into the forcible entry (*or* forcible detainer) complained of by A. B. against C. D., having made their inquisition, by which the said C. D. is found guilty of the said forcible entry (*or* detainer), and the defendant not having traversed the said inquisition within the time allowed by law, I, J. D., County Judge of the county of Kings, before whom the said proceeding is pending, do hereby award restitution to the said A. B. of the premises described in the said inquisition, and assess the costs and expenses¹ of the said proceedings at the sum of —— dollars.

J. D., *County Judge.*

7. *Writ of Restitution.*

The People of the State of New York to the Sheriff, or to any constable of the county of Kings, greeting: Whereas A. B., of ——, in said county, did on the —— day of ——, 1866, make complaint to me in writing, duly verified, that C. D., on —— day of ——, &c., did (*here recite the substance of the complaint, and state the subsequent proceedings*). Now this is to command you to go to the premises aforesaid and cause the said C. D. to be restored and put into full possession of the said lands and premises; and you are also to levy and collect the sum of —— dollars of the goods and chattels of the said C. D. (excepting such goods and chattels as are by law exempt from levy and sale on execution), and to bring the money before me within sixty days from the receipt of this precept by you, to render to the said A. B. for his costs and charges herein ——

Given under my hand this —— day of ——, 1866.

J. D.,
County Judge of Kings county.

¹ The costs and expenses are the fees of the officers who are required to perform the services. 6 How. Pr. R. 173; 4 Hill, R. 541.

8. *The Traverse of Inquisition.*

The People, &c., on
the relation of A. B., }
against
C. D. }

And afterwards, to wit, on the — day of —, at the city of —, in the county of —, before J. D., County Judge of the said county, comes the said C. D. in his proper person, and having heard the said inquisition read to him, hereby traversing the same, denies that he is guilty of the said supposed forcible entry (*or holding out*), in manner and form as in the said inquisition alleged, and of this he put himself upon the country, and the said people do the like, (*or, after "traversing the same," proceed thus*) alleges that he or his ancestors, or those whose estate he has in the lands described in the said inquisition, have been in quiet possession thereof for the space of three whole years next before the said inquisition found, and that his interest therein is not yet ended or determined (and of this he puts himself on the country, and the said people do the like, &c.)

C. D.

9. *Precept for the Jury to try the Traverse.*

The People, &c., to the Sheriff or any constable, &c., greeting: You are hereby commanded to summon twelve good and lawful men of the town of —, in said county, duly qualified to serve as jurors in courts of record, and not of kin to either A. B. or C. D., both of —, in the county of —, to come before the undersigned, County Judge of — county, at his office in —, on the — day of — instant, at — o'clock, A. M., of that day, to make a jury of the county, to try, upon their oaths, a certain traverse of an inquisition found, upon the complaint of the said A. B., against the said C. D., and now pending before me, for a certain forcible entry (*or holding out*) made by the said C. D., into the lands and premises of the said A. B., against the form of the statute in such case made and provided; and that you make a list of the persons

summoned, and certify and annex the same to this precept, and make return hereof to me without delay.

Given under my hand this — day of —, 1866.

J. D., *County Judge.*

10. *Award of Restitution after a Verdict.*

Title of the proceeding as before — : The jury summoned to try and determine the forcible entry (*or detainer*) complained of by A. B. against C. D., upon the traverse of an inquisition found against the said C. D., having rendered their verdict, by which it appears that the said C. D. is found guilty of the said forcible entry (*or detainer*), I, the undersigned, County Judge of the county of —, before whom the said proceeding is pending, do hereby award restitution to the said A. B. of the premises described in the complaint, and do assess the costs and expenses of the proceedings at — dollars.

Dated, &c.

J. D.

County Judge, &c.

11. *The Writ of Restitution.*

(*Is the same as before, reciting all the proceedings.*)

12. *A Certiorari to Remove the Proceedings.*

The People of the State of New York to J. D., County Judge of the county of —, greeting: Whereas we have understood on the complaint of C. D., that lately before you a certain inquisition was found against him for (*state the finding of the jury*). And we, being willing that the said inquisition, and all other proceedings concerning the same which remain before you, should be certified, and returned by you into our Supreme Court of Judicature, before our justices thereof, do command you that you certify and return the same to the justices of our said court, with all proceedings appertaining thereunto, at the next term of the said court, to be held at —, on — next; so that our said justices may further act thereupon, as of right and according to law should be done; and have you then and there this writ.

Witness, J. W. G., Esq., Justice of the Supreme Court
at ——, the —— day of ——

J. W., Clerk.

C. & S. Condit, Attorneys.

(Indorsed.) On the application of C. & S. Condit, attorneys for C. D., and upon his affidavit, I allow the within writ of *certiorari* to issue.

J. W. G.,

Justice of the Supreme Court.

13. *Bond on Allowance of Certiorari.*

Know all men by these presents, &c. (*in the usual form of a bond*).

The condition of this obligation is such, that if C. D. shall appear, at the return of a certain writ of *certiorari* issued out of the Supreme Court of the State of New York, returnable on the —— day of ——, 18 —, and directed to J. D., County Judge of the county of ——, commanding him to certify the inquisition and all other proceedings concerning a certain forcible entry alleged to have been made into certain lands and premises of A. B., the obligee above-named by the said C. D., and if the said C. D. shall answer to the inquisition found against him as aforesaid, and abide such order and judgment as the said Supreme Court shall make in the premises, and pay all costs that shall be awarded against him, then the above obligation to be void; otherwise, to remain in full force and virtue.

Sealed and delivered }
in the presence of }

C. D. (L. s.)
B. L. (L. s.)
K. B. (L. s.)

To be acknowledged with a justification of sureties in usual form.

I approve of the sureties in the above bond, and of the sufficiency thereof.

J. W. G.,
Justice of Supreme Court.

I N D E X.

INDEX.

[The references are to the paragraphs. §§ 1-424 b. are contained in Vol. I.]

A.

ABATEMENT of nuisance, when allowed	§ 208
and to what extent	209
previous demand unnecessary	210
of rent, when allowed	386
ABATOR , who is	64
ABUSE OF DISTRESS	613
ACCEPTANCE of rent, creates a tenancy	60
when a waiver of notice to quit	485
forfeiture	497
of assignee, may discharge a lessee	438
of new lease, operates as a surrender	507
ACCIDENT , does not suspend rent	372
nor discharge liability to repair	357
ACCIDENTAL FIRE , tenant not liable for	196
ACKNOWLEDGMENT OF LEASE , when necessary	171
by married woman of her deed, how made	103
now dispensed with by statute	104
ACTION by tenants in common	114
what landlord may maintain for injuries to the inheritance	173
what liable for to strangers or tenant for defects	175
what tenant liable for	175, 177
what tenant may maintain	173, 176, 177, 200
when stranger may maintain for sale of distress	182
by joint tenants	264
for double rent	530
against sheriff for not retaining rent	603
of debt for rent	615-634
for use and occupation	635-655

ACTION — *continued.*

by joint tenants in equity for rent	§ 656-660
of covenant	661-685
for waste	686-697
of ejectment	698-712
to recover possession	713-728
for irregular or excessive distress	729-738
of replevin	739-763
for trespass	764-779
of trespass on the case	779-785
of trespass <i>quare clausum fregit</i>	777
<i>vi et armis</i>	779
ACT OF GOD , when tenant excused by	289, 347, 360
no relief as against an express covenant	364
entitles tenant to emblements	535
ACTUAL ENTRY , on lands, how far necessary	68
(<i>See ENTRY.</i>)	
lessee cannot bring action before	178
by landlord on termination of lease	524
use and occupation will not lie before	641
when unnecessary	698
ADMINISTRATOR , leases by	133
may collect rent, when	390
right of, to emblements	536
(<i>See EXECUTOR AND ADMINISTRATOR.</i>)	
ADVERSE POSSESSION , invalidates a lease	84
what constitutes	86, <i>note 1</i>
ADVERTISING PREMISES FOR SALE , effect of	406
by landlord, not a dissolution of tenancy	473
AFFIDAVIT to authorize distress	579
to claim rent of execution creditor	599
for summary proceedings	721
AGENT , leases by, to be in name of principal and within authority	137
when his authority to be under seal, and when to be recorded	137
acts may be ratified	138
when he exceeds his authority, lease good <i>pro tanto</i> .	138
when in name of the principal	139
when personally liable	140
form of execution of lease by	141
cannot make a lease to himself from his principal .	142
of joint tenants, notice to quit by	479
when must have previous authority	479
notice to quit when given by	480

AGREEMENT FOR A LEASE , for more than a year to be in writing	§ 30
when valid under the Statute of Frauds	30
when enforced in equity, for part performance	32, 33
what, and its effect	37
English legislation in respect to	37
how it differs from a present demise, a question of construction	38
words of present demise may be controlled	39
not a lease if terms executory	40
otherwise if the estate is to vest at once	41
but not if the terms are uncertain	42
general rule as to	43
must contain all intended provisions	44
except those which are collateral	44
with reference to usual covenants	45
when performance enforced	46
when not, or only in part	47, 48
must conform to the statute	49
for lodgings not a lease	66
if void, still fixes the amount of rent to be paid	80
" AGREE TO LET ," when these words create a lease	38, 39
AGRICULTURAL FIXTURES	548
<i>(See FIXTURES.)</i>	
ALIEN may take a lease when at common law	143
English doctrine of alienage modified in the United States	143
in what States may take, but cannot make, a lease	144
in what States may convey	145
ALTERATION OF LEASE , destroys the instrument, not the estate	165
by subsequently inserting name of lessee, defeats it	149
AMBASSADORS , goods of, exempt from distress	596
AMBIGUITY , construed in favor of lessee	81
" AND " and " OR ," distinction between	75, <i>note</i>
ANIMALS , to be kept within enclosure	183, 186 <i>a</i>
waste in respect to	347
when distrainable	591
APPAREL , wearing, cannot be distrained	587
APPORTIONMENT OF RENT , when	383, 443, 679
none if tenant evicted	386
except in case of a tenant for life	387
or of periodical payments	387
APPRAISEMENT after distraining, when to be made	609
APPURTEANCES , what are	161

APPURTENANCES — *continued.*

what are not	§ 162
when depending upon evidence	163
ARTIFICER , goods in hands of, not distrainable	587
ASSESSMENT , covenant to pay	395
(See TAXES AND ASSESSMENTS.)	
ASSIGN , lessee may, unless restrained	108, 402
covenant not to	402
how construed, under-letting not a breach of	403
pre-emption right on, void in a lease in fee	404
taking in a partner or lodger not a breach	405
depositing lease as security, no breach	406
when restricted to particular person	407
by operation of law, no breach of covenant	408
except expressly so agreed	409
discharged by license, though partial	286, 410
unless it be stipulated to the contrary	410
discharged by waiver; otherwise as to under-letting .	411
waiver otherwise than by receipt of rent	412
not relieved in equity	413
runs with the land	413
void deed no breach of	413
ASSIGNEE of lessor and lessee, how affected by estoppel .	92
of lessee liable to lessor	16, <i>note</i> , 109
of reversion can enforce forfeiture when	295, 296
nature of his title, by privity of estate and contract .	436
bound by covenants running with the land .	260, 261, 437
of the reversion, not entitled to sue on lessee's cove-	
nants at common law	439
but now is without attornment by statute Hen.	
VIII.	295, 439, 460, 616
at common law in an action of debt only	440
by statute where as to leases not under seal	441
attornment dispensed with by statute 4 Anne	442
when chargeable <i>pro tanto</i>	443
not chargeable on mere collateral covenants	444
may have the benefit of all covenants running with the	
land	445
but only if same estate as reversioner	446
rights of assignee of the rent alone	447, 448
no privity between lessor and under-tenant	448
when liable to lessee on his covenants	448
liable only during occupation	449
actual entry by, unnecessary unless assignment by law	450, 451
but liable if he accept the assignment	451

ASSIGNEE — *continued.*

discharged from further liability, by assigning over	§ 452, 680
even if assignment be nominal, if occupancy given up	453, 454
mortgagee when liable as assignee	455
in bankruptcy, when liable	456
effect of bankruptcy on lessee's covenant	457
trustees under an assignment must elect in reasonable time	458
executors and administrators chargeable as assignees	459
not, if contract wholly personal to testator	460
may discharge himself by assignment	461
liability of heir as assignee	462
when heir of lessee takes as	463
ASSIGNMENT , how it differs from an underlease	16, <i>n.</i> , 109, 426
<i>in fact</i> , to be in writing and sealed when	427
but estate passes without a seal	427
<i>in law</i> , nature of	427
requisites of the former	428
transfer of an equitable interest does not amount to	428
cannot be under an older title	429
what interests may be assigned	430
what are understood to be usual covenants in	431
when by marriage	432
devise	433
of lessor only by statute	433
when by executorship	434
sale under execution	435
of premises mortgaged	455
for the benefit of creditors	456
consequences of	425
by lessee does not relieve from express covenants	438
nor of implied, without lessor's assent	438
ASSUMPSIT , for use and occupation	635
ASSURANCE , covenant for further	323
what constitutes breach of	324
when new lease to be executed	326
ATTORNEY , execution of lease by	139, 149
ATTORNMENT , by tenant to a stranger void	180
when unnecessary	439, 442, 621
AUCTIONEER , distress on goods in his hands	589
AVOWRY , what it is	753
and cognizance	755
practice in	756-761
judgment in	762
AWAY-GOING CROP , when tenant entitled to	538

B.

BAILIFF , warrant of distress to	§ 569
his authority to distrain	580
unlawful acts of	578
liability of landlord for his acts	578, 613
acting for joint tenants	569
BALLROOM , when not a fixture	548
BANKRUPTCY bars suit for specific performance	47
forfeits covenant of renewal	337
effect of, on accruing rent	456
does not discharge rent to accrue except by statute	457, 652
BARN , when not a fixture	548
BARON AND FEME	101
(<i>See HUSBAND AND WIFE.</i>)	
BEASTS OF THE PLOUGH privileged from distress	597
BILL OR NOTE does not extinguish rent	565
BLIND PERSON , lease by	98
BOARDERS , property of, not distrainable	595
BOARDING , not a tenancy	24, <i>note</i>
BOND , no satisfaction of rent	565
BOUNDARIES , how to be set forth	160
specified and artificial, how far conclusive	163
monuments control	163
imperfect, effect of	164
on streams or rivers	229
BOUNDARY TREES may be lopped	190
BREACH OF AGREEMENT bars a specific performance	47
BREAKING OPEN doors to take a distress	578
windows	578
BROTHEL , lease for the purpose of, void	521
BUILDINGS , what tenant may erect	187
after a certain pattern, covenant for	415
removal of adjoining	231
right of support from	231
risk of removal	232
support from adjoining	233
erected for purposes of trade, a fixture	546

C.

CANCELLING A LEASE , no surrender	§ 511
CARE , what is ordinary	199, <i>and note</i>
CARELESSNESS in use of fire	196
or other lawful thing	195, 197
in preventing accidents	192, 198
no liability for, if mutual	194, 199
CARRIER , goods in his possession, not distrainable	589
CATTLE , owner bound to keep them at home	183
trespasses by	184
when distrainable for rent	597
of stranger when exempt	597
CHATTELS , may be leased	18
real, husband's right to wife's	101
CHIMNEY-PIECES , when fixtures	547
COGNIZANCE	755
(See <i>Avowry</i> .)	
COLLATERAL COVENANTS , when valid	44
do not run with the land	260
COMMENCEMENT OF LEASE , when	68
in possession only from entry	68
payment of rent is evidence of	69
notice to quit, no evidence of	69
lease for years, void for uncertainty in	70
effect of an impossible date of	71
when on a future event	73
when from day of date	78
COMMITTEE OF LUNATIC , leases by	136
COMMON CARRIER , goods in hands of not distrainable . .	589
COMMONS , what is meant by	218
when appendant or appurtenant	219
cannot be apportioned	220
CONDITIONS IN LAW AND IN DEED , what	271
what conditions implied by feudal law	271
how they may be created	272
how a condition differs from a limitation	273
what implied in the relation of landlord and tenant at common law	274
when precedent or subsequent	275
does not depend upon words, but priority of obligation .	276
only precedent when go to whole consideration	276
precedent, construed liberally	277
but equity will not relieve for non-performance . . .	277

CONDITIONS IN LAW AND IN DEED—*continued.*

though otherwise of a condition subsequent	§ 277
by what words a condition is created	278
implied in a proviso if no words making an agreement	279
when to be annexed to the estate, and when performed	280
impossible, if subsequent, estate absolute	281
impossible, if precedent, prevent estate vesting	282
personal disability does not excuse performance. . . .	282
must not be illegal or contrary to public policy	283
or repugnant to the grant	283, 284
pre-emptive right on alienation, repugnant to a grant	
in fee	285
one license discharges	286
forfeiture of, how waived	287, 497–501
when defeasible only by entry, and when without	288, 492
substantial performance of, sufficient	289
of re-entry on breach of, origin of	290
effect of re-entry	291
proviso operates only during term	292
only to be reserved to grantor or his heirs	293
and ceases with the estate in reversion	294
when assignee of reversion may take advantage of	293, 295, 296
assignee of part of reversion cannot	296
when demand necessary	297
no actual entry required	298
how when no sufficient distress on premises	299
no re-entry, unless expressly reserved	300
when previous notice required	301
effect of re-entry clause	302
when mortgagee may redeem	303
lessor entering avoids all incumbrances	303
not apportionable	296
nor implied as to state of premises	381
CONFIRMATION OF LEASE , by infant	94
of husband's lease by wife	102
CONSERVATORY , when a trade fixture	546
CONSIDERATION , sufficient must appear in lease	152
what illegal	153
CONSTRUCTION , general rules of	160, <i>note</i>
rules of in description	160, <i>note</i> , 164
CONTINUANCE , when so long as both parties please . . .	82
in the city of New York	77
when first day excluded	78
when lease void for uncertainty as to	75
determined by lease though void	80

CONTINUANCE OF LEASE , when optional	\$ 81
when agent exceeds his power	83
CORN , when distrainable	292
CORPORATION may lease like a natural person	126, 127
need not employ its corporate seal	127
when board of directors may bind	128
may by agent, or may ratify	128
may become lessee	128
may lease by parol	129
effect of its seal, and how affixed	129
COUNTERPART OF LEASE , what	146
COUNTRY , custom of, effect of	540
COVENANT , action of, when it lies	661
by lessor against lessee or his assignee	662
for unliquidated damages, why preferable	663
in whose name to be brought	664
when by assignee of reversion	665
by, but not against, one interested in deed-poll, though not named	666, 668
when by an heir or executor	666
against whom it lies	668
the legal representatives of covenantor	669
what declaration should contain	670
practice, when covenant is under penalty, as to remedy on bond	671
judgment thereon to stand as security	672
when sum fixed is penalty, and when liquidated damages .	673
how breaches to be assigned	674
what certainty required	675
what damages recoverable	675
general issue in	676
plea of eviction	677
paramount title how to be proved	678
apportionment of rent in	679
assignment before breach relieves an assignee, not a lessee	680
defendant may show payment to another if compulsory .	681
cannot set off lessor's breaches, but may recoup . . .	682
plea of <i>non damnificatus</i>	682
defendant may show breach of condition precedent .	683
issue of assignee or not, performance, waste, &c., on whom	684
relief in equity when given	685
COVENANTS , what are usual between lessor and lessee . .	45
of under-lessee are not for indemnity	110

COVENANTS — *continued.*

what are usual between assignor and assignee	§ 431
advantage of, under a penalty	671
generally	244
definition of	245
when express and when implied	246
by what words	246, 247
may be in any part of the deed	247
may be in form of an exception	248
recital	249
proviso	250
license	251
the word agreed, or its equivalent, essential	250
rules of construction	246, <i>notes</i>
implied, nature of	252
none qualified where there is an express one on same subject	252, 253
may be qualified or restricted	254, 255
distinctions between express and implied covenants .	256
implied, to be liberally construed	256
when none implied in New York by statute	257
in whose favor they arise under a deed-poll	258
covenantee may sue on, though he has not signed . .	259
parties not bound by, unless they sign	259
when they run with the land	260, 444
only bind assigns if named or as to a thing <i>in esse</i> . .	260
privity necessary, to burden of covenant running	261 and <i>n.</i>
when collateral merely	261
what run with the land	262
when they are personal	263
joint or several	264
when independent or dependent, &c., conditions .	265
void because deed void	266
or as illegal or contrary to public policy	267
or relievable in equity as hard or oppressive . .	268
may be discharged or suspended by act of covenantee	269, 270
effect of tearing off seals	270
on the part of the lessor for quiet enjoyment . .	304-317
against encumbrances	318-322
for further assurance	323-326
to make repairs	327-331
to renew the lease	332-341
to pay taxes and assessments	341-342
on the part of the lessee to make repairs	343-368

COVENANTS — *continued.*

on the part of the lessee to pay rent	\$ 369
to pay taxes and assessments	395
to insure	400, 401
not to assign	402, 413
to reside on the premises	414
to build after a certain pattern	415
against carrying on trades	416-419
for particular mode of cultivation	420, 423
to redeliver fixtures	424
to secure payment of rent	424 a, 424 b

CROPPER, is not a tenant 24, and note

(See *EMBLEMMENTS*.)

CROPS , tenancy in common of	24, and note
when distrainable	592
rights to away-going	538
injunction to prevent removal of	691
landlord's lien on	424 a
landlord's statutory lien on	424 a, note

CULTIVATION, covenant for particular modes of operation

of	420
when implied	421
how far sustained in equity	422, 423
effect of custom on	541
CURTESY , tenant by, the leases of	101
waste by	692
CUSTOM , how far it regulates an agreement	538
as to away-going crops	540
effect of, as to fixtures	554
in determining a question of waste	350

D.

DAMAGES, measure of. (See *the particular covenants*.)

DATE OF LEASE , <i>interesse termini</i> begins at	68
day of, computation from	78
insertion of an impossible date of commencement, effect of	71
how far material	148
effect of a reference to, in lease	148
how to day of date	150
DAYTIME , distress must be taken in	573
DEAF AND DUMB PERSON , lease by	98

DEATH OF LESSOR , effect of	§ 459
LESSEE, effect of	460
DEBT FOR RENT , action of, what and when maintainable	615, 616
lies against assignee of a term	616
or lessee after apportionment	616
or lessee who enters tortiously	617
or by lessee against his assignee	617
generally for past occupation under a lease	618
lies against tenant for life, years, or at will	619
lessee still liable although he may have assigned	620
but not after acceptance of rent from assignee	620
against assignee, only concurrently with his interest	620
founded on privity of contract or estate	620
attornment necessary at common law	621
but dispensed with by statute	621
not against tenant by sufferance, except for double rent by statute	622
or when holding over after notice	623
deed need not be declared on nor entry or assignment alleged	624
but assignee of the reversion must set out his assignments	624
when local, or transitory	625
how laid against an executor	626
special pleas in this action as eviction	627
bill of interpleader when	627
infancy, or <i>nil debet</i>	628
tenant estopped to deny title	629
but may show title ended	629
unless by agreement pleaded as payment	630
set-off not allowed of breaches of landlord's covenants .	630
but these may be recouped	631
when mortgagee may maintain	632
plea of tender in of money or specific articles .	633, 634
DEDUCTIONS FROM RENT , when made	374
of tax from rent	396
DEED , when required for a demise	34, 146
for an assignment	427
for a surrender	509
how executed by an agent	139
counterpart what	146
indenture and deed-poll, nature of	147
takes effect from delivery	167
effect of registering	168

DEED — *continued.*

witnesses, when required to	\$ 170
when to be recorded	171
poll, action on	665
distinguished from indenture	146
commencement of term on delivery of	68
DELIVERY OF DEED , what constitutes	167, 168
presence of lessee not necessary for, if done with his consent	168
when in escrow	169
DEMAND OF RENT to establish a forfeiture	297, 493
when a waiver of forfeiture	498
of notice to quit	485
DEMISE , what property the subject of	17
of live stock	18
when by implication	19
by express agreement	26
to be in writing	27
by possession	32
under seal	34
how it differs from an agreement	38
possession necessary to	85
when by a disseisor	84
infant	93
married woman	101
joint tenants	114
tenant for years	108
mortgagor and mortgagee	118
corporations	126
agents and attorneys	137
executors and guardians	133
aliens	143
proper words of	159
the word implies covenant of quiet enjoyment	252
DENIZEN may make leases	145
DESCRIPTION OF PREMISES , in lease	160
if general, incident passes	161
appurtenances follow	163
imperfections in, effect of	164
DESERTION OF PREMISES , how landlord may enter on	714
DESTRUCTION OF PREMISES , if total, avoids the lease	520
DETERMINATION OF TENANCY , generally	464
by lapse of time	465
notice to quit	466-484
forfeiture	485-501

DETERMINATION OF TENANCY—*continued.*

by merger	§ 502-506
surrender	507-518
taking premises for public use	519
destruction of building	520
becoming house of ill fame	521
tenant's disclaimer	522
rights of tenant on	523
landlord on	531
DEVISEE, when bound by lessor's covenants	433
entitled to the benefit of covenants	433
DISABILITY, personal, does not excuse performance	282
DISCLAIMER BY TENANT, when it forfeits his term	522
DISSEISIN, what	84
when it avoids lease	519
DISSOLUTION OF TENANCY, various modes of	464-522
consequences of	523-554
DISTRESS FOR RENT, history and policy of	556
the remedy anciently a forced pledge, now a satisfaction	557
in what States it prevails	558, 559
incident to every species of rent	560
amount of rent must be fixed with certainty	561
lies only upon a valid demise	562
and while relation of landlord and tenant exists	563
holding over continues the right	564
right not extinguished by a note, or judgment for rent	565
only by payment or satisfaction	565
or by tender	566
no previous demand necessary	566
in whose name to be made	567
passes to assignee of reversion, not of rent	568
when by joint tenants, or tenants in common	569
how by husband and wife, guardian, or executor	570
when by mortgagee	571
when by statute, after removal of goods from premises	572
such removal must be fraudulent	576
and not after a <i>bonâ fide</i> sale or mortgage	577
at what time may be made	578
not after a tender	578
separate distresses, on several demises	574
in what place may be taken	574
when off the demised premises at common law	575
by statute, when	576
but not goods of stranger vendee or mortgagee	577

DISTRESS FOR RENT—*continued.*

how entry on the premises and seizure to be made	§ 578
by whom conducted	579
affidavit to be made, what must state	579 <i>a</i>
landlord's warrant, what form of	580
for what amount of rent, arrears when	581
cannot include interest	581
inventory to be taken	582
goods distrainable are all movable goods on premises .	583
goods not the property of the tenant, exempt when	182, 583, 584
goods exempt by statute	585
privileged conditionally	597
which cannot be identified	586
privileged for the benefit of trade	587
on deposit with innkeeper, warehouseman, &c. .	588, 590
with a common carrier	589
animals <i>feræ naturæ</i> generally not distrainable . . .	591
fixtures are not	592
goods sold, but remaining on the premises, not for prior rent	593
nor those in custody of the law	594
or of a receiver	595
or goods of boarders at hotels	595
or wearing-apparel, or things in actual use	596
goods of public ambassadors	596
beasts of the plough, mechanics' tools, or cattle of stranger on premises	597
or goods taken in execution	598
by statute in England a year's rent reserved	598
affidavit required	598
notice of affidavit to sheriff in this case	599
a year's rent retained only where existing tenancy .	600
how far the lien extends	601
not as against an under-tenant, nor on landlord's execu- tion	602
officer's liability, how enforced	603
on what grounds officer liable, and proceeding	604
how goods to be disposed of, cannot be kept on the premises	605
cattle to be impounded	606
pound breach and rescue	606
notice to tenant required	607
distress cannot be used	608
liability, if distress be injured	608

DISTRESS FOR RENT—*continued.*

sale of distress allowed by statute	§ 609
appraisement and sale of goods	610
fraudulent removal of goods permits distress by statute	611
penalty for fraudulent removal	612
liability for irregular distress	613
for wrongful distress	729
not for a mere irregularity	737
when not liable for trespass, <i>ab initio</i> , by statute	614
DISTURBANCE , what amounts to	313
what will amount to a nuisance	211
must be of a substantial character	388
remedies of tenant for	178
DIVISION FENCES , when tenant must maintain	183-186
when may be removed	187
trees growing in	190
DOG , trespass by	186
vicious, on premises	195
DOMESTIC FIXTURES , what are	547
(See FIXTURES .)	
DOOR , outer, not to be broken on distraining	578
except for goods fraudulently removed	611
DOUBLE RENT , tenant holding over liable for	524
demand and notice necessary	526
when notice to be given	528
waived	528
consequence of notice given by tenant	529
verbal notice by tenant sufficient	529
DRUNKARD , lease by, when void	100
DUMB PERSON lease by	98
DURATION OF LEASE , what at common law	73
when perpetual	74
when uncertainty renders lease void	75
how rendered certain	75, 76
with reference to matter <i>ex post facto</i>	77
in city of New York when no time mentioned, is from May 1st	77
when optional is at tenant's option	81
so long as both parties please	82
when lessor exceeds his own interest	83
DURESS , lease under, voidable	99
DWELLING , or mansion-house, what is	67

E.

EASEMENTS , what are attached to a tenancy	§ 212-236
created by grant or prescription, not by license	237
assignable on by deed	238
how extinguished	239
disuse of, must be permanent not temporary	240
effect of encroachment on, or interruption of	241, 242
when established by prescription	243
EJECTMENT , when by lessor	698
against whom, and for what property	699
when to enforce a forfeiture, and avoid demand	700
by statute when in New York	701
when notice to quit must be given	702
by a mortgagee	703
how premises to be described	704
tenant estopped to deny title in this and other actions .	705
proof of lease alone necessary	705
all parties in privity estopped	705, <i>and note</i>
estoppel concurrent with possession	705, <i>and note</i>
if lease by deed, production conclusive	706
tenant may show fraud	707
or if he did not receive possession, mistake also .	707, <i>and note</i>
or eviction	708
estoppel as to lessor's assignee	708
but may show no valid assignment	708
tenant may show if lessor's interest has expired	708
relief against, in favor of a tenant by payment into court	709
or by bill in equity	709
action for <i>mesne</i> profits	710
against whom, for such profits	711, 712
how issue in, to be tried	712
(See SUMMARY PROCEEDINGS.)	
EMBLEMMENTS , what, and who entitled to	534
out of what property may be claimed	534
when lease terminated by act of law or landlord	535
none, if termination of lease is certain	536
when under-tenant entitled to	536
in favor of trade	536
no compensation for ploughing	537
tenant for years not entitled to except by custom . . .	538
if express stipulation, usage controlled	539
otherwise if incorporated	540
as to removal of manure, in agricultural leases	541

EMBLEMMENTS — *continued.*

when outgoing tenant entitled to by usage	§ 542
when he loses his improvements	543
ENCROACHMENT may be abated	101
effect of, upon a right of way	241
when it enures to the landlord's benefit	179
ENTRY , necessity of, by lessee	68, 176
when requisite for a forfeiture	288
lessor's right of	291
by lessor, when no discharge of rent	389
(See RE-ENTRY.)	
landlord's right of, on termination of lease	524
EQUITABLE ASSIGNEE , when liable for repairs	365
EQUITABLE MORTGAGEE , not liable for covenants	428
EQUITY will control trustees' leases, when	131
executors' or administrators', when	134
enforce married woman's contracts as to separate estate	106
enjoin a nuisance	209
will not aid in enforcing a condition subsequent	282
will enforce covenant for further assurance	323, 324
will not compel landlord to rebuild	329
recognizes and enforces customary renewals, when	336
will grant specific performance	46
when refuse to direct renewal	337-339
will restrict waste though covenant for	355
relieves when against breach of covenant not to assign	413
cannot enforce covenants to cultivate, but may enjoin	422
relief, in case of forfeiture	495, 496
tenant may have interpleader, when	627, 657
suit in, for rent, in case of uncertainty	656
against <i>cestui que trust</i> , or in favor of a grantee of rent	
when	657
or in case of mutual accounts or of discovery needed	658
when against under-tenant	659
rent when regarded as a trust in	659
when as to mesne profits	660
will restrain breach of covenant, or give specific per-	
formance when	685
will prevent waste	690-697
when will relieve in ejectment	712
ESCHEAT of alien's property	143
ESCROW , what constitutes	169
ESTATE FOR LIFE , how created	51, 52
must commence <i>in praesenti</i>	52
for years, may commence <i>in futuro</i>	68

ESTOPPEL , lease takes effect by, when lessor had no title	§ 87
effect of recitals in defeating	88
of tenant by acceptance of lease, origin and limits of rule	89
need not be reciprocal	90
who bound and entitled by	91
assignees may avail themselves of	92
how it effects a surrender	507
prevents tenant disputing title	629-705
ESTOVERS , what are	218
cannot be apportioned	219
when right to, extinguished	220
who entitled to take	350
must be reasonable	351
EVICTION discharges covenant to repair, when	366
suspends rent	377, 378
even out of part, if by lessor	379, 649
lessor's guaranty against	378
is a defence to an action for rent	627
plea of, in action of covenant	677
by title paramount, rent apportioned	378
when by landlord's immoral conduct	380
acts constituting	381, <i>and notes</i>
though not continued, discharges rent	386
if during the quarter no rent due	387
what will amount to	388
covenant against, how broken	308
damages for	317
EXCAVATIONS , damage from	233
(See QUIET ENJOYMENT.)	
EXCEPTIONS AND RESERVATIONS in a lease, how made	157
difference between	158
when a covenant	248
EXCEPTIONS against casualties by fire and tempest	331, 373, 376
EXCESSIVE DISTRESS , action for	729
EXECUTION of a lease, what	166
when it takes effect	167
in escrow	169
what is a sufficient signature	35
complete without witness	170
term may be sold under	176
how it affects the right of distress	600
EXECUTOR AND ADMINISTRATOR , leases by, when	133, <i>and note</i>
one may execute, but all should join	133

EXECUTOR AND ADMINISTRATOR—*continued.*

have absolute power over testator's terms	§ 133
when controlled or avoided in equity	134
when entitled to rent	390
when he takes a term of years	434
how far chargeable with rent	459
of lessee, what covenants entitled to	459
when chargeable <i>de bonis propriis</i>	459, 461
of lessee, what covenants bound by	460
when he may waive lease	461
when liable <i>de bonis propriis</i>	461
when entitled to emblements	536
to distrain	570
liable for rent	620
how liable in debt or covenant	625, 626, 669
when liable for waste by testator	689
EXPIRATION OF TENANCY , tenant's duties on	524
his rights on	533
EXPRESS TENANCY , what amounts to	26
EXTINGUISHMENT of easements	239
of rent, when by eviction	386

F.

FACTOR , goods of his principal not distrainable	587
FALSA DEMONSTRATIO NON NOCET	164
FARM , what passes as a	161
FARMING LEASES , restrictions on	420
FEME COVERT , leases by	101
(See MARRIED WOMEN.)	
FEE-SIMPLE , leases in	50
reservation of rent on	370
FENCE-VIEWERS , office of	184
FENCES , division, how far tenant bound to support	183
damages for not repairing	184
who bound to make	185
trespass by animals escaping from enclosure	186
when they may be removed	187
consequences of a premature removal of	187
FERÆ NATURÆ , animals, when subject to distress	591
FINES , on alienation of lease	404
FIRE , destruction of premises to prevent when	181
accidental or negligent, when tenant liable for	196
tenant liable for careless use of	196

FIRE—*continued.*

tenant not liable for accidental	§ 196
nor to rebuild, in case of	343
except under covenant	357, 372
no suspension of rent	375
lessor not liable to rebuild in case of	329

FISHERY, common of, may be leased	17
what is	221
confined to fresh water	222
may be regulated by statute law	222
none in navigable stream	223

FIXTURES, covenant to redeliver	424
what are at common law as between landlord and tenant	544
defined, and what constitutes	544, <i>notes</i>
trade fixtures, what and when removable	545
houses may be	546
buildings of gardeners and nurserymen	546
trees in nursery	546
domestic fixtures and ornaments, what	547
irremovable when	544, <i>note</i> , 547
agricultural, not removable	548
otherwise by American law	548
mere personal chattels, not fixtures	544, <i>note</i> , 545, <i>note</i> , 548

fixtures only personal property as to right of removal .	549
regulated by local customs	549
must be removed without injury	550
so substituted fixtures	550
can only be removed before the end of the term	551
or during the tenant's rightful possession	551
a surrender or new lease abandons the right of removal .	551
when tenancy uncertain, his right to, not abandoned .	552
on voluntary quitting, landlord entitled to	553
how far regulated by custom	554
or special agreement	554
not distrainable	592

FORCIBLE ENTRY AND DETAINER.

what force allowable in entering on or expelling ten-	
ant	531, 532
distinguished from summary process	717, <i>note</i>
general doctrine of, and statutes	786, <i>and note</i>
what amounts to	787
when actual force required	787, <i>note</i>
as to vacant premises	788
by whom complaint to be made	789

FORCIBLE ENTRY AND DETAINER — *continued.*

what estate or possession requisite	§ 789, <i>and note</i>
lawful possession only required in the United States	790
how to be alleged	790
complaint how made	791
proceedings thereupon	791
title of relator not to be questioned, what a defence	792
award of restitution	793
<i>certiorari</i> and appeal	793
indictment for	794
FORFEITURE , general doctrine of, what at common law	488
now only by breach of express stipulation	489
terms of, strictly construed	489
when by commission of waste	490
breach of condition indivisible	491
heir or executor of lessor may enforce	492
lease voidable only at the election of lessor	492, <i>and note</i>
when for non-payment of rent	493
when demand of rent necessary	297, 493, 494
relief from, where compensation can be decreed	495
no relief in any other case, as for non-repair, insuring, &c.	496
nor for a wilful neglect	496
what amounts to a waiver of	287, 497, 498
no waiver, if cause of forfeiture continues	500
re-entry for subsequent breach of continuing condition	501
"FORTHWITH," meaning of, in covenant to repair	361
FRAUD , lease obtained by, void	98
FRAUDS, STATUTE OF , what demises within	28, 29
what agreements	30, 31
when enforceable in equity	32, 33
when a seal required by	34
what a sufficient signature under	35, 36
lease void under, may define the contract of letting	80
assignments within	427
FRAUDULENT removal of goods to avoid distress	611
FROM THE DAY of date, meaning of	78
FRUIT falling over line fence, may be retaken	191
FURNISHED APARTMENTS , no implied condition on letting of	381
FURNITURE may be leased	18
FURTHER ASSURANCE , covenant for, what	323
entitles to relief in equity	323, 324
will cover subsequently acquired title	324
what constitutes breach of	324

FURTHER ASSURANCE — *continued.*

extends only to reasonable acts	§ 325
when deed to be executed	326
FUTURE lease, agreement for	30
interest, lease of	85
effect of a stipulation for	37

G.

GARDEN , passes with lease of house	161
GARDENERS , when tenants, may remove trees, &c.	546
GOOD-WILL of a lease, what	332, 336
"GRANGE," what is a	161
GRANT , what passes under	161
construed most strongly against grantor	251
the word implies a covenant when	252
GRANTEE of the reversion, rights of	439
can sue for breach in his own time only	445
(<i>See Assignee.</i>)	
GRANTOR AND GRANTEE , rule as to fixtures between	544
(<i>See Fixtures.</i>)	
GROUND-RENT , if under-tenant pays may deduct	395
GROWING CROPS , who entitled to	538
(<i>See Crops.</i>)	
GUARDIAN , leases by, in whose name	135
good during ward's minority	135

H.

HEDGE , rights of adjoining parties in	191
HEIR of lessor, when estopped	91
what covenants bound by	462
what descends to	463
of lessee, what covenants bound by	462
what descends to	463
HEREDITAMENTS , leases of	17
rent cannot issue from	369
HIGHWAY , tenant must not encumber	193
cattle not allowed upon	183
grass on, to whom it belongs	186
obstruction of a nuisance	201 <i>a</i> and <i>b</i> , 202
HOLDING OVER , tenant is trespasser, or tenant at lessor's election	22

HOLDING OVER — *continued.*

in New England tenant is at sufferance only	§ 22
consequences of, by tenant or under-tenant	524
when upon terms of original demise	525
statutory penalty upon, of double rent	526
what notice required to be given before statute applies	527
when and to whom given	528
after notice has been given by tenant, penalty for remaining	529
liability for special damages	530
of trustees and guardians	530
when landlord may re-enter and with what force	531, 532, <i>and notes</i>
when under authority in fact	532
how far tenant justifiable in	533
HOTEL , boarding at, not a tenancy	24
HUSBAND , leases by, of wife's land	101
good at common law during their joint lives only	102
might be affirmed by her if in writing	102
may join and make her deed good in the United States	103
liable for rent on lease to wife	105
HUSBANDRY , good, what requisite to	544

I.

ICE , is property, and its taking may be regulated	224, <i>note</i>
right to take from navigable streams,	224, <i>note</i>
IDIOTS , leases by or to, void or voidable	97
binding, if mere weakness of mind and no advantage taken of it	98
ILLEGAL CONDITION , effect of	283
ILLEGAL USE of premises, when it defeats lease	521
IMPEACHMENT OF WASTE , what	355
IMPLEMENTS OF TRADE , not distrainable	597
IMPLIED COVENANTS	252
(<i>See COVENANTS.</i>)	
IMPLIED TENANCY , when	19-25
covenant, what	257
conditions, effect of	274
IMPOSSIBLE CONDITION , effect of	281
IMPOUNDING CATTLE , when	605
effect of tender of rent, before	606
who must provide food for	605

IMPROVEMENTS , what constitute	§ 524
landlord not bound to pay tenant for	335 <i>a</i>
when claim for waived	543
INCIDENT , to a grant, what	161, 162
INCOMING TENANT , privileges of	542
(See <i>CUSTOM.</i>)	
INCORPOREAL HEREDITAMENTS , may be leased	17
use and occupation lies for	638
what pass by lease	178
INCUMBRANCES , covenant against includes what	318
tenant for life bound to keep down	318 <i>a</i>
outstanding claim a breach without ouster	319, 320
entitles lessee to compensation on foreclosure	320
what constitutes a breach of	321
rule of damages on	322
INDEBITATUS ASSUMPSIT , for use and occupation	635
INDEMNITY , when under-tenant entitled to	110
when lessee entitled to	448
INDENTURE , formal parts of	146
differs from deed-poll how	147
date of, unimportant	148
names of parties	149
recitals in, effect of	150
reservation of rent in	152
exceptions, object of	157
words of demise	159
description of premises	160
INDICTMENT , for forcible entry or detainer	794
INDORSEMENT , when part of deed	164
on lease, effect of	164
INFANCY , defence to an action for rent	628
INFANT , leases by, voidable only	93
ratification of	94
disaffirmance of, can only be by himself	95
leases to, are binding while he is in possession	96
when bound by guardian's lease	135
INJUNCTION , against waste	691
bad husbandry	422, 692
general damage	693
erecting a nuisance	208 <i>in note</i> , 418
not granted on uncertain grounds	695
(See <i>EQUITY.</i>)	
INN-KEEPER , no distress of goods in hands of	587
INSANE PERSONS , leases by	97
mere weakness does not invalidate	98

INSOLVENCY , when a forfeiture of lease	§ 337
when a bar to specific performance	49
effect of, on lessee's covenants	457
INSURANCE , change of tenants does not vitiate	108, <i>note</i>
tenant not bound to make	400
INSURE , covenant to, by lessee	400
what amounts to breach of	401
no relief in equity from breach of	401
when it runs with the land	400
INTENTION to create a tenancy, how inferred	20
INTERESSE TERMINI , nature of	15, 72
when it begins	68
INTEREST , when payable on rent	391
cannot be distrained for	581
INTERPLEADER , bill of, when it lies	627, 657
INTOXICATION , lease by person in a state of, when void .	100
INTRUDER , effect of lease by	84
INVENTORY , taken on a distress	609
IRREGULARITY in distraining, effect of	614
action for	729
when trespass a concurrent remedy	732

J.

JOINT TENANTS , what they may lease	114
leases by, when these bind co-tenants	114
unlike leases by tenants in common, make but one demise	115
actions by	264
distress by	569
notice to quit by	479
service of notice upon	481

L.

LACHES , in the performance of an agreement	49
in applying for a renewal	389
LAND , no implied warranty on letting	381
LANDLORD , relation of to tenant (<i>see TENANCY</i>).	
when his rights as such begin	172
his general rights during the tenancy	172-174
may sue for injuries to the reversion	173

LANDLORD — *continued*.

not to sue for trespass during tenant's possession	§ 174
retains a general superintendence only	174
is not prejudiced by tenant's acts	175
nor liable to third persons for condition of premises	175, 182
unless a nuisance when demised	175, 182
or made so by his own acts	175
not liable to tenant for condition of premises	175 <i>a</i>
liable to lessee, if he withholds possession	177
when liable to third persons for negligence	182
when liable for nuisance	175, 207
how far bound to repair	327
does not guarantee condition of premises	381
lien of, on crops or goods	424 <i>a</i>
by statute	424 <i>a, note</i>
his rights on termination of tenancy	523
when and how he may resume possession	531, 532
remedies of, generally	555
distress	556-614
debt	615-634
use and occupation	635-655
suit in equity	656-660
covenant	661-685
waste	686-697
ejectment	698-712
summary proceedings	713-728
LAPSE OF TIME , termination of lease by	465
LATERAL SUPPORT , right to	233-236
LEASE , history and origin of	13, 27
nature and essentials of the contract	14
creates an estate	14
when realty and when personality by statute	14, <i>note</i>
differs from assignment, in requiring a reversion	16
what property may be the subject of	17, 18
how created	26
when must be in writing by Statute of Frauds	28
what mere estates at will, and what excepted from the statutes	29
agreements for <i>in futuro</i> , what by statute	30
leases differ from mere licenses	31
agreements for, when enforced in equity	32
as for part performance	33
when lease must be under seal by statute	34
what is a sufficient signature to	35, 36
as defined by statute in England	37

LEASE — *continued.*

how it differs from an agreement	§ 37
whether lease or agreement, a question of construction	38
what amounts to a present lease	39
an agreement only	42
lease when in fee	50
for life differs how from lease for years	51
how created	52
for years, and from year to year, origin of	54
from year to year, nature and condition of	55
at will	59
takes effect from delivery	68
as to possessory rights from entry	68
commencement implied from what	69
when void for uncertainty in commencing	70
effect of uncertain date of commencement upon	71
for years, may commence <i>in futuro</i>	70, 72
for life, cannot commence <i>in futuro</i>	70, 72
may be of perpetual duration	50, 74
but can only be created by deed	34
termination of, how stated or ascertained	75-79
though void, creates a tenancy at will, and fixes rent and termination	80
cannot exceed estate of lessor	83
may be made by any one in possession capable to contract	84
cannot be made by a disseisee	85
possession follows the title	85, 86
arising from estoppel	87, 88
by infants	93-96
by deaf and dumb persons	98
by persons of unsound mind	97-100
by intoxicated persons	100
by married women	101-107
by tenants for years	108-113
if by tenant at will, void	112
by joint tenants, or tenants in common	114-116
by partners	115, 117
by mortgagor and mortgagee	118-125
by corporations	126-129
by trustees	130-132
by executors and administrators	133, 134
by guardians	135
by receivers	136
by agents	137-142

LEASE — *continued.*

by aliens	§ 143-145
when by deed, and formal parts of	146
nature of a deed-poll	147
the date not essential	148
in whose name should be made	149
omission of lessee's name fatal	149, <i>and note</i>
recitals in	150
effect of misrecitals	151
reservation of rent in	152-156
consideration of	152, 153
exceptions in	157
special reservations	158
words of demise	159
description of premises	160-164
alterations in	165
execution of	166
when to be witnessed and stamped	170
recorded	171
what covenants in, run with the land	262
assignment of	425-435
distinction between void and voidable	492
determination of, by lapse of time	465
forfeiture	488
merger	502
surrender	504
notice to quit	466
disclaimer	522
destruction of premises	520
becoming house of ill-fame	521
taken for public uses	519
LESSEE, his interest before entry	15
liable on his covenants after assignment	438
may sue assignee of the reversion	441
entitled to indemnity from assignee	448
LESSOR, his interest after executing lease	173
his interest after assignment	447
cannot sue an under-tenant	448
(<i>See LANDLORD.</i>)	
LETTER OF ATTORNEY	137
LICENSE, when to be in writing	31
cannot create an easement	237
is a justification for acts done under it	237
to assign, discharges covenant.	410
condition	286

LICENSE—*continued.*

may be restrained	§ 411
when it amounts to a covenant	251
effect of, in trespass	766
LIEN , mechanic's, landlord not liable to during lease	174
of landlord on crops or goods as security	424 a
created by statute in many states	424 a, note
for expenditures by lessee	533
LIFE , nature of the tenancy for	51
tenant for, who is	52, 53
leases for, cannot begin <i>in futuro</i>	70, 72
tenant for, cannot lease beyond own life except by a power	112
or by statute	113
but terms of lease may be adopted by remainder-man	113
or he may join remainder-man in leasing	113
when his interest begins	176
must keep down charges	318
apportionment of rent on death of	383
entitled to emblements	534
waste by	697
LIGHTS , ancient, doctrine of	239, and note
LIMITATION OF ESTATE , what	272
how it differs from a condition	273
LIQUIDATED DAMAGES , differs from penalty	673
LIVERY , horses standing at, distrainable	588
LIVERY OF SEISIN , what	68
LIVE-STOCK , lease of	18
LODGERS , their privileges and liabilities	67, 161
LODGINGS , agreement to occupy, not a lease	66
occupying, not a tenancy	24, note
when such agreement and when a lease	66
LUNATIC , leases by	97

(*See IDIOTS; INSANE PERSONS.*)

M.

MACHINERY , when a movable fixture	545
MANURE , when it may be taken from farm	541
usage in respect to	542
MARRIAGE BROKAGE , vitiates lease	153
is an assignment of a wife's term	432
MARRIED WOMAN , leases by, void at common law except by power	101

MARRIED WOMAN — *continued.*

husband's leases of her land, good for their joint lives only	§ 102
may be affirmed by her	102
deed of, good in United States, if executed how	103
may make leases without her husband, by statute when	104, <i>and note</i>
cannot act by power of attorney	104
leases to, vested estate, but did not bind for the rent .	105
liable on covenants if authorized to contract as sole .	106
liable as to her separate property in equity when	106
now by statute when	107
property acquired by the contract is separate property .	107
powers as executrix	133
MECHANIC'S LIEN , landlord generally not liable to	174
on premises held under improvement lease	415, <i>note</i>
MEDIUM AQUÆ FILUM	229
MENTAL WEAKNESS , when lease avoided by	97, 98
MERCHANT , goods in hands of, not distrainable	587
MERGER , what, and when it determines a tenancy	502
estate must be of same quality, and in same right	503
must be in the next vested estate	504
both estates must be held in the same right	505
can only be in a larger estate	506
MESNE PROFITS , action for	710
not against an executor	712
MESSUAGE , what	161
MILL-SITE , how right to, extinguished	240
"MONTH," meaning of the term	77
MORTGAGE OF CHATTELS to secure rent	424 <i>a</i>
of leasehold interests	455
MORTGAGEE , if subsequent, may not dispossess a tenant 119, 121 if prior he may	120, <i>and note</i> , 121, <i>and note</i>
no tenancy between him and mortgagor	121
but is entitled to collect rent in certain cases	121
rights modified by statute	122
what in New York, and when may have a receiver ap- pointed	123
after entry may take rent in Massachusetts	124
tenant may redeem from	124
should join with mortgagor in a lease	125
may redeem from forfeiture	303
when bound to repair	365
when liable as assignee	455
when liable to emblements	537

MORTGAGOR, is not a tenant	§ 25, 121
leases by, are good except as to existing mortgagee	118, 120, 121, <i>and note</i>
when entitled to rents in Massachusetts	124
should join mortgagee in making lease	125
will be restrained from committing waste	694
MOVABLES, generally subject to distress	

N.

NAMES OF PARTIES to a lease	149
omission of lessee's name	149
NAVIGABLE WATERS, right to fish in	222, 223
to take ice from	224, <i>note</i>
subject to public easement	229
NEGLECT, ordinary, what is	199, <i>note</i>
NEGLIGENCE, tenant liable for negligent use of his premises	192-195, 197, 198
or improper use of fire	196
not, if injury caused by wrong-doer, or when mutual .	199
in removal of adjoining soil and buildings	231
NEW YORK, manor lands in	12
termination of leases, in city of	77
avowry and cognizance in	755-762
landlord's proceeding on vacant possession in .	714-716
NON COMPOS MENTIS, leases by one who is	97, 98
NOTE, taking of, does not extinguish rent	565, 681
NOTICE TO QUIT, necessary to terminate general tenancy	
at will	466
strict tenancy at will by any act inconsistent therewith	466
tenancy from year to year only by formal notice	467
so any other uncertain tenancy if not at sufferance	468
or holding under a void lease or agreement to purchase	
when rent is paid	469
and notwithstanding death of the tenant, from year to	
year	470
may be given by tenant also	470
unnecessary, if no tenancy exists	471
or if a day is fixed for terminating lease	471
or if no privity exists between the parties	472
or if tenant disclaims	472
or in case of adverse holding	472
by tenant, unnecessary if landlord accepts surrender .	473

NOTICE TO QUIT — *continued.*

mortgagor, when entitled to	\$ 474
what extent required, and when to be given	475
when to expire	476
on what day, if a day is named	477, <i>and note</i>
what the substantial time of entry	478
when irregularity waived	478
in whose name and by whom given in case of joint tenants	479
a substituted agent, and when ratification	480
to whom given, and how designated	481
by statute to be in writing	482
must be explicit, but mistake in immaterial if intelligible	483
service in person or on representative good	484
how waived	485
subsequent notice no waiver if so expressed	486
position of the parties after notice	487
NUISANCE, when landlord liable for	175
landlord's and tenant's remedies for	200
what amounts to	201, <i>and note</i> , 201 <i>a</i> , 201 <i>b</i>
by interfering with rights of others	202
not for the reasonable use of a right	203, 205
nor for a mere inconvenience	204
what disturbance will amount to	206
injury need not be consummated	207
continuance of, who responsible for	175, 207
when legalized by long use	208
equity will enjoin	209
or tenant may abate	209
if public, any one may abate	209 <i>a</i>
what force he may make use of	210
no previous demand necessary	211
nuisance may be both public and private	211
when it excuses payment of rent	381
action for continuance of	784
NURSERY, trees in, may be removed	546
<i>(See FIXTURES.)</i>	

O.

OBSTRUCTION in street, tenant's liability for	193
if through tenant's agency	194
OCCUPANT, who is	19, <i>note 2</i>
when liable for taxes, &c.	395

OCCUPATION, tenant's liability for	§ 635
without agreement creates no tenancy	19
OLD AGE, a lease not to be avoided for, if no fraud	99
OPERATION OF LAW	507
(See SURRENDER.)	
OPTION of landlord, to avoid lease	22
who entitled to in case of doubt	81
of tenant, for further term	332
"OR," important to distinguish the word	75, note
ORAL DEMISES, good when	26, 27
ORDINARY CARE, what	199, and note
ORNAMENTAL TIMBER, waste in	352
OUT-GOING TENANT, right to remove chattels	533
right to remove emblems	542
when may retain possession	533

P.

PAROL EVIDENCE, to explain description when	164
to explain lease when	539
PART PERFORMANCE, effect of	32
PARTIES TO A LEASE in general	84
infants	93
persons of unsound mind	97
intoxicated persons	100
married women	101
tenant for years	108
joint tenants	114
mortgagor and mortgagee	118
corporations	126
trustees	130
executors	133
guardians	135
committees and receivers	136
agents	137
aliens and denizens	143
PARTITION FENCES, obligation to maintain	367
each occupant bound to contribute	367
PARTNERS, real estate is in common	114, and note
lease like tenants in common	115
may bind each other by deed when	117
no obligation to build	188
taking in a, no breach of covenant not to assign	405

PARTY-WALL , what constitutes	§ 188
obligation on adjoining owners to rebuild or repair	188, 189
use of ancient wall by adjoining owners	190
each co-tenant bound to maintain	367
PATROON , in New York, what	12, <i>note</i>
PAYMENT OF RENT , evidence of tenancy	22
creates a tenancy from year to year	56
how far, by giving note or bond	565, 638
at what time due	391
where payable	392
when with interest	391
in specific articles	393
PERFORMANCE , of agreement, when enforced	47
of covenant, when excused	269
of condition, how discharged	289
PERIODICAL PAYMENTS , no apportionment of	387
PERMISSIVE WASTE	349
(<i>See WASTE.</i>)	
" PERMITTING AND SUFFERING ," meaning of	321
PERPETUAL RENEWAL	333
(<i>See RENEWAL.</i>)	
POLL DEED , difference between, and indenture	146
POSSESSION , effect of, on an invalid lease	32
what constitutes	84, <i>note</i>
necessary to the validity of a lease	85
when it follows ownership	86, 785
adverse prevents lease	85, 86
infant bound for rent while in	96
when tenant bound to yield	524
when landlord may take by force	531
proceedings to recover	713
is material to trespass	780
how far tenant may retain	533
POUND BREACH AND RESCUE , action for	606
POWER , lease under takes effect from estate of donor	83
POWER OF ATTORNEY , lease under	137
how to be stated in conclusion of lease	141
PRECEDENT , when a condition is	275, 276
PRE-EMPTION , reservation of, on sale, void as repugnant to grant	285, <i>and note</i>
PREMISES , in lease, how described	161
how identified	164
PRESCRIPTION , regulates division fence	185
regulates use of running water	227
length of time necessary to establish	243

PRIVITY OF CONTRACT AND ESTATE	§ 436
how determined by assignment	437
none between lessor and under-tenant	448
PROPERTY, what may be demised	17, 18
PROSTITUTION, lease for purpose of, void	521
no rent can be recovered	644
keeper of house of, may be dispossessed	512
PROVISO, is a covenant if terms of agreement	250
what constitutes	279
(See CONDITION.)	
PUBLIC MINISTERS, goods of exempt from distress	596
PUBLIC USE, premises taken for, entitles to compensation	181
tenancy dissolved thereby	519
but not if only part taken	519
Q.	
QUIET ENJOYMENT, covenant for implied in every demise	304
extends only to lessor and those claiming under him	305
applies only to possession	306
express covenant against, whom and what	307
broken by lawful eviction only, and not by defective title	308
what constitutes a breach	309
must be by paramount title, though lessee may attorney thereto	310
actual ouster or its equivalent necessary	311
stranger's ouster no breach unless so expressed	312
not for a mere personal wrong, or trespass	313, 380
when by eviction under elder title	314
by eviction from any material part	315
when adverse holding constitutes breach	315
or landlord's immoral conduct	316
covenant for, runs with the land	262
measure of damage on breach of, is market value, not rent	317
(See RENT, §§ 377-384.)	
QUIT, notice to, when it determines a tenancy	466
R.	
RAILWAY may be leased	17
lessors remain liable for defective repairs	17, note
RASURE OF DEED, not a surrender	511

RATIFICATION of lease by infant	§ 93
of agent's lease	137
of bailiff's authority to distrain	580
RECEIPT OF RENT , acknowledgment of a tenancy	22
waiver of a notice to quit	485
waiver of a forfeiture	497
RECEIVER , mortgagee may have in New York	123
leases by	136
when bound to pay rent	459
RECITALS IN LEASE , how far an estoppel	88
effect of error in, immaterial	150
how far material	151
when covenants	249
RECORDING LEASE , when necessary	171
object and effect of	171
RECOUPMENT against demand for rent	374
RE-ENTRY , power of, to whom reserved	293
advantages of this clause	291
must have a reasonable construction	291, <i>note</i>
operates only during the term	292
who may re-enter	293
how reversioner must avail himself of	294
when assignee of reversion	295
grantee of a rent reserved	295
not by assignee of part of the reversion	296
when previous demand necessary	297, 493
actual entry, how far dispensed with	288, 298, 299
when demand of rent dispensed with by statute	300
no right of re-entry if not reserved in the lease, or if a distress	301
process lies by statute even if there is a distress	302
for non-payment of rent	493-495, 700
for commission of waste	490
effect of on subsequent liens	303
for breach of a continuing covenant	412, 500
in case of non-insurance	401, 496
when by heir or executor	492
on forfeiture of lease	488-501
landlord may use force	531
when by express authority	532
tenant's right after lease ended	533
(<i>See FORFEITURE.</i>)	
RELEASE , by way of enlargement of estate	507
RELIEF from forfeiture	495
REMAINDER-MAN , when bound by lease of tenant for life	113

REMOVAL OF BUILDINGS	§ 231
duty of adjoining occupant upon	232
of goods after lease ended	533
of fixtures, when must be made	551
RENEWAL OF LEASE , lessor's covenant for, what	332
tenant no right to, unless stipulated for	332, <i>note</i>
option for further term without express renewal	332
covenant for, runs with the land	332
renewals, how construed, perpetual not favored	333
implied renewal of a tenancy	22
receipt of rent, evidence of	23
perpetual renewal, only if plainly expressed	334
appraised value on, how regulated	335
when covenant for, enforced	335
in default of, to pay for improvements	335 <i>a</i>
right of customary renewal recognized in equity	336
when specific performance not ordered	337
a voluntary engagement for, not enforced	338
nor on an insufficient consideration	338
nor if lessee guilty of laches	339
what amounts to negligence in applying	339
concurrence of under-lessee unnecessary by statute	340
RENT , not essential to a lease	14
payable though lessee has not entered	15
unless lease strictly at will	15
from what species of property it issues	17
payment of, when evidence of a tenancy	23, 69
infant liable for as a necessary	96
may be reserved in gross, but must be fixed	152
advantages of, when in kind	152, <i>note</i>
if fraudulent or contrary to law, lease void	153
to whomsoever payable	154, 369
follows reversion on general reservation	154
special reservation of, to whom to be made	155
effect of mistake in, ancient strictness relaxed	156
the covenant to pay	369
different species of	370
payable without any express agreement	371
advantage of express covenant	371
covenant to pay, runs with land	371
lessee not relieved from, by casualty	372, 373
may recoup damages for not repairing	374, <i>and note</i>
has no relief against his express covenants	331, 375, 376
express exception if premises untenantable	376
breach of covenant of quiet enjoyment a defence	377

RENT—*continued.*

partial eviction, how far a defence	§ 378
eviction further defined	379
trespass no eviction	380
loss of beneficial enjoyment when an eviction	381, <i>and note</i>
rent not barred if condition of premises not warranted	382
when such warranty implied	383
not payable if no estate passes	384
when apportioned or suspended	385
not on assignment by lessee	385
how apportioned by act of law	386, 387
as in case of opening a street	375, 386
where premises partly destroyed	388
extinguished, though eviction not continued	388
no abatement for proportional part of the term	389
except by statute on the death of tenant for life	389
to whom payable	390
when payable to executor	390
at what time it becomes due; and tender to prevent forfeiture	391
where to be paid	392
how to be paid, if in money	393
if in specific articles	394
re-entry for non-payment of	290–302, 492–494
demand of, to establish a forfeiture	493
in arrear, not assignable	447
otherwise, if to grow due	447
penalty of double rent	526–530
remedies for enforcing payment of	555
effect of taking bond or note for	565
not extinguished by taking other security	565
remedy for in equity, in case of uncertainty	656
or against <i>cestui que trust</i>	657
REPAIRS, lessor not bound for, unless by express covenant	327, 328
even in case of fire, and he receives the insurance	329
exceptions to this rule	328, <i>and note</i>
what liable to make	330
lessor entitled to notice	330
under covenant, lessor must reinstate the premises	330, 331
what lessee liable to make	343
tenant liable for general repairs, but not for accidental fire	343
in farming leases, according to good husbandry	344
bound to prevent waste	345

(See WASTE.)

REPAIRS — *continued.*

covenant for, by lessee, binds to rebuild and runs with the land	§ 357
natural decay, no breach, but direct injuries are . . .	358
what constitutes a breach, condition of premises con- sidered	359
accident no excuse where express covenant	360
when action lies before expiration of the term	361
reasonable time to be allowed for repair	361
tenant holding over, still liable to make	362
general, how affected by special covenant	362
tenant liable to make even if lease void	363
not excused from covenant in case of fire or tempest .	364
nor if assignee or mortgagee	365
but a mere depositary is not bound	365
not limited by amount agreed to be insured	366
is discharged by eviction, but only <i>pro tanto</i> by part eviction	366
as to co-tenants and party-walls	367
how far co-tenant bound	367
rule of damages is injury to market value of reversion	368
when tenant may surrender for want of	375
REPLEVIN, action of, when it lies for taking or detaining	
goods	739
liability of sheriff, for taking insufficient security	740, 742
what care required of the sheriff on his bond	741
bond how executed, and liability of sureties on . . .	742
effect of a delay to prosecute	743
effect of death of plaintiff	744
liability of the sureties	745
sheriff must deliver actual possession	746
proceedings on claim of property, security to redeliver	747
for what personal property the action lies	748
by whom it may be brought, what title or possession required	749
husband and wife	749
joint tenants or tenants in common	749
lies against landlord for what illegal distress	750
venue in, when local	751
as to the declaration	752
effect of various pleas	753
pleas in bar	754
avowry at common law	755
how altered by statute	755, 756
pleas to the avowry	757

REPLEVIN — *continued.*

when place material	§ 754, 758
other defences	758
when defendant entitled to property	759
when tenant may impeach defendant's title	759
avowry must show what and how by tenants in common	760
avowry requiring reply, pleading and judgment on . .	761
judgment for return or damages	762
varieties of execution	763
REPUGNANCY ,	160, <i>note</i>
RESCUE , when it may be made	729
RESERVATION OF RENT , what	152
in lease, what	152
if general, follows lessor's interest	154
when special	155
how distinguished from exception	158
RESIDENCE ON PREMISES , covenant for, and breach of	414
REVERSION , landlord's remedy for injuries to	173
rent follows	154
when reversioner may re-enter	294
assignee of	442
REVERSIONARY LEASE , what	72
RIGHT OF WAY	213
RUNNING WATERS , right to the use of	224
when regulated by prescription	227
right on navigable stream	229

S.

SEAL , when necessary	34
what constitutes	166
one sufficient for several persons	166
SECURE RENT , covenant to	424 <i>a</i>
rules as to suretyship apply to	424 <i>a</i> , 424 <i>b</i>
when in form of a lien	424 <i>a</i>
suretyship strictly construed	424 <i>b</i>
discharge of surety	424 <i>b</i>
SET-OFF , by way of payment	374
SHARES , land let on, is a tenancy when rent paid, or a demise	24, <i>and note</i>
SHERIFF , to retain a year's rent on execution	600
not liable without notice	602
how compelled to pay	603

SIGNING OF LEASE, what is sufficient	§ 35
place of, when material	36
SPECIFIC PERFORMANCE, of agreement when enforced	46
when not	47
necessary preliminaries to	48
due diligence necessary to	49
when enforced in favor of mortgagor	125
of covenant to repair	172
of covenants generally	685
(See COVENANTS.)	
STAMP, leases formerly required to have	170
assignments also	427
STATUTE OF FRAUDS (See FRAUDS.)	
STATUTORY LIENS OF LANDLORD	424 <i>a, note</i>
STAYING PROCEEDINGS, for non-payment of rent	726
STEAM-ENGINE, not a fixture	545
STILLS, not fixtures	545
STRANGER, not bound by estoppel	91
rent cannot be reserved to	155
cannot take advantage of condition	293
STREAMS, boundaries on	229
SUBTERRANEAN WATERS	230
SUFFERANCE, tenant at	64
when he becomes tenant at will or from year to year	65
not entitled to notice to quit	466
is liable for use and occupation	64, <i>note</i> , 642
not liable for rent	64
except by statute	622
SUMMARY PROCEEDINGS, to recover possession what	303,
	713
in case of a vacant possession when	714
what constitutes such possession	715
only where there is no sufficient distress	716
when tenant holds over, or fails to pay rent	717
cases in which they lie by statute	717
process distinguished from forcible entry and detainer	
	717, <i>note</i>
when previous notice to be given	718
when demand of rent to be shown	718
the magistrate's jurisdiction	719
statute applies only where tenancy exists	720
do not lie against mortgagor	720
nor after distraining for rent	720
but do in favor of grantee of lessor at will	720
where only in favor of the immediate reversioner	720, 720 <i>a</i>

SUMMARY PROCEEDINGS — *continued.*

where in favor of any party entitled to possession § 720, <i>note</i>	
preliminary affidavit and summons	721
particular requisites of the affidavit	721 <i>a</i>
how summons to issue	721 <i>b</i>
how served	722, 722 <i>a</i>
how claim may be contested	723
and jury summoned	723
what issues may be raised; proceedings	724
warrant to put in possession	724
adjournment and subpœnas	724
effect of a warrant of dispossession	725
when to be stayed	726
in case of a sale on execution	726
when lessee may be reinstated	727
<i>certiorari</i> upon, without stay of proceedings	728
may be appealed from	728 <i>a</i>
process in States other than New York	728 <i>a</i> , <i>note</i>
grounds of proceedings	728 <i>a</i> , <i>note</i>
time of notice	728 <i>a</i> , <i>note</i>
estoppel of tenant how far, and on what issues	728 <i>a</i> , <i>note</i>
SUPPORT , right of, from neighboring soil	233
how far dependent on prescription	234
lateral pressure not to be increased	235
from adjoining buildings	236
SURETY , when not affected by surrender	508, <i>note</i>
to secure rent	424 <i>b</i>
(See Covenants.)	
SURRENDER , what is, and how it differs from a release . .	507
to whom made	508
can be made only to the reversioner	508
<i>in fact</i> , must be in writing, by Statute of Frauds . .	509
technical words of	510
cancellation of lease no surrender	511
by operation <i>at law</i> , what amounts to and when . .	512
accepting second lease	512
the new lease must pass a certain interest	512
cannot operate <i>in futuro</i> , but must <i>in præsenti</i> , though lease future	513
mere agreement not, without acceptance of new tenant by landlord	514
by continued change of possession	515
consent of all parties necessary	515
waived by lessor underletting without lessee's consent	516
consent to substitute must be mutual	517

SURRENDER — *continued.*

interest of sub-tenant not affected by	§ 111, 517
original rights and remedies preserved after	518
SUSPENSION OF RENT, when	378
not by a mere trespass	389

T.

TAXES AND ASSESSMENTS, tenant for life bound for	318
lessor is responsible for	341
lessee may pay and deduct from rent	341
tenant entitled to indemnity against	342
rents liable for, as personal property	342, <i>note</i>
tenants liable to pay in first instance and deduct from rent	395
to be deducted from rent of each year, when	396
tenant may assume by covenant	397
even extraordinary assessments when	398
when considered due	399
TENANCY, how created	14
by <i>implication</i> of law from occupancy or contract, when	19
from other circumstances	20
when not to be implied	21
when by payment or receipt of rent on a holding over	22
when by remaining in possession, or suffering a distress	22
none, if money is not paid as rent	23
nor by boarding at a hotel, or mere tenancy in common of crops	24
nor where a vendee is let into possession before he takes a deed	25, <i>note</i>
nor if the position of parties must be referred to any other cause	25
by <i>express</i> agreement may be by deed, writing, or orally	26
history and nature of	27
effect of Statute of Frauds upon	28
statutes of other States	29
if to commence <i>in futuro</i>	30
for life, must commence <i>in præsenti</i>	51
may arise by grant in general terms	52
at will only at first, afterwards from year to year	54
for years and from year to year, origin of	54
from year to year, nature and conditions of	55
may commence <i>in futuro</i>	68

TENANCY—*continued.*

from year to year, by general occupation when	§ 55
by payment of rent, or other circumstances	56
not where shorter period agreed for or implied	57
is a term assignable, &c., subject to notice to quit	58
at will , how created	59
strict and general distinguished	60
payment of rent a criterion	61
how each determined	62
notice to quit, when required	63, 466
by sufferance , is a mere naked possession	64
may become a tenancy at will or from year to year	65
determined by mere entry	467
on payment of rent, becomes tenancy from year to year	56, 525
for lodgings when to be in writing	66
incidents of	67
duration of, at common law	73
for life, when terminated	112
in common, what	114
of a mortgagor	118
how terminated	464
lapse of time	465
notice to quit	466-487
forfeiture	488-501
merger	502-506
surrender	507-518
premises taken for public use	519
destruction of premises	520
using for illegal purpose	521
disclaimer	522
TENANT , holding over when a trespasser	22
liability on holding over	524, 525
in fee	50
by the courtesy, effect of his leases	101
for years, may lease or assign	108
for life must pay interest on incumbrances	318
consequences of under-lease, distinguished from assignment	109
may lease beyond his own life or estate when	111, 112
remainder-man when bound by terms of	113
from year to year	54
his tenancy arises, when and how terminated	55
effect of his under-lease	111
at sufferance when	64

TENANT — *continued.*

becomes at will by landlord's consent	§ 65
at will cannot underlet	112
not bound to repair	367
interest of, vests upon delivery of a deed	147
of mortgagor prior to mortgage, how liable to mortgagee	119
subsequent to mortgage	120
of mortgagor may redeem	124
general rights and liabilities of a tenant	172
when his rights and responsibilities attach	172, 176
cannot sue landlord for defects in demised premises	175, 175 <i>a</i>
cannot sue lessor if stranger withholds	176
entitled to full possession	176, 177
but liable <i>pro tanto</i> if accepts part	177
may maintain actions	178, 200
responsible for the repair of highways, for nuisances, &c.	178
must preserve boundaries	179
must respect rights of co-tenant	179 <i>a</i>
must give landlord notice of ejectment and protect his possession	180
may recover value of property taken for public use . .	181
liable to stranger for negligence	182
must support fences and party-walls	183-186
how far liable for nuisance or negligence	192-196
must not obstruct or endanger street	192
or leave accessible property in dangerous condition	193,
	197, 198
not liable for the carelessness of a stranger or trespasser	194
but is where life endangered or act criminal . .	194 <i>a</i>
must not keep vicious dog on premises	195
liable for negligent use of fire	196
or other careless act	197
entitled to what easements	212-236
ways	213-217
commons	218-220
fisheries	221-223
watercourses	224-230
support of land or building	231-236
his right to quiet enjoyment	304
for life must keep down incumbrances	318
always impeachable for waste	697
his remedy against nuisances	200
holding over is liable to forcible removal	531, 532
right to remove his goods	533
retain possession	533

TENANT — *continued.*

right to emblements in case of uncertain tenancy	§ 534-541
to away-going crops	542
to fixtures	544
cannot dispute his landlord's title	629, 705
how far he may in action of ejectment	707, 708
how far in summary process	728 <i>a, note</i>
his remedies what, for wrongful distress	729-738
replevin	739-763
trespass and case	764-785
TENANTS IN COMMON , rights of	114, 179
lease by, is of several interests	115, 116
when must join in action	115
not liable for each other's negligence	179, <i>and note</i>
mutual rights and duties as lessees	177 <i>a</i>
liability for repairs	367
TENDER , of deed how made	49, <i>note</i>
of money, when to be made	391
where, to prevent a forfeiture	392
how made	393
requisites to its validity, and if in specific articles	394
how pleaded in debt for rent	633, 634
how it affects a distress	729
TENURES , origin of	1
different species of feudal	5
allodial	6
socage	7
in the United States	8
in New York	9
TERM , what is a	15
signifies the estate as well as time	16
commencement of	68
when on a contingency	70
uncertain date	71
for what period	73
how duration of established	75-77
when from day of date or act	78, 79
if lessor exceeds his interest	80
TERMINATION OF LEASE , how ascertained from the	
lease	75
or by reference <i>aliunde</i>	76, 77
in city of New York by custom from May 1	77
from what time computed	78
fixed by agreement in lease, though void	80
when left optional, is at the tenant's option	81

TERMINATION OF LEASE—*continued.*

from year to year so long as both parties please: is from year to year	§ 82
if lessor exceeds his estate	83
by lapse of time	465
by notice to quit	466
forfeiture	468
merger	502
surrender	507
when premises taken for public use	519
by destruction of premises	520
being turned into house of ill-fame	521
tenant's disclaimer	522
tenant's rights after	533, 551
TIMBER , what considered to be	350
may be cut by tenant, for repairs	351
cut wastefully, belongs to owner of inheritance	354
TIME , how computed from a date, or an act	78, 79
how from an act	79
TITLE , tenant not allowed to question landlord's	629, 705–707
but may show it has expired	629, 708
TRADE , covenant not to carry on, valid	416
recognized in law if limited, not general restraint	417
what constitutes a breach of this covenant	418, <i>and note</i>
how construed, breach and waiver of	419
TRADE FIXTURES , what	545, 546
(<i>See FIXTURES.</i>)	
TREES , encroaching on division fence may be lopped	191
cutting off, when waste	350
when taken for repair	351
clearing up new country	352
felled, part of inheritance	354
prevention of waste in	691
trespass for cutting	173, 765
in nursery ground may be removed	546
TRESPASS , landlord can maintain when during lease	173
upon land, action for, distinguished from case	764
nature of, and what constitutes	765
every continuance a fresh trespass	766
intention immaterial	767
to what property	768
when and what possession by plaintiff necessary of per- sonal property	769
what property the subject of	770
title or possession of trees	771

TRESPASS — *continued.*

right of property or possession required as to realty	§ 772
constructive possession, when	773
who may maintain	774
effect of license, in fact or implied	775
license in law, and trespasser <i>ab initio</i>	776, 777
against whom it lies	778
case and trespass, distinction between	779
case when injury is consequential	780
not trespass, but case, for excessive or irregular distress	781
or where process irregular	782
or by reversioner	783
or for incorporeal hereditament	784
action lies against personal representatives	785
TRESPASSER upon the tenant, when landlord is	174, 613, 614, 765, 776
TROVER, by landlord, for trees cut down	174, 771
for severed fixtures	553
by tenant, for goods wrongfully taken	739
TRUSTEE, leases by, good at law	130
<i>cestui que trust</i> should concur	130
if trustee has a fee, leases good without	131
but equity will control	131
duration of such leases	131
if not shown to be reasonable, liable as for a breach of trust	132

U.

UNCERTAINTY, when it avoids agreement	70
in whose favor to enure	81
UNDERGROUND STREAM, use of	230
UNDER-LEASE, who may make	108
differs from an assignment	16, <i>and note</i> , 109
lessee's indemnity upon	110
how defeated	111
not a breach of covenant not to assign	403
UNDER-LETTING, covenant against, whether bar assigning	403
UNDER-TENANT, no privity between him and lessor	109, 448
covenants of, do not give indemnity	110
entitled to indemnity against lessor's covenants .	110, 738
estate of, not defeated by tenant's surrender . .	111, 517
rights as between each other	179
as to carrying on business	416

UNDER-TENANT — *continued.*

privilege as to emblements	§ 536
not liable to lessor, on lessee's covenants	636

USAGE	538
-----------------	-----

(*See Custom.*)

USE AND OCCUPATION, when action of *assumpsit* or

debt for, lies	635, and note
before statute 11 Geo. II. c. 19	635, note
not unless relation of landlord and tenant exists, or continues	636 and note, 637
for the use of an incorporeal hereditament	638
or of the rent without the reversion	639
not if lease is by deed	640
by whom maintainable	639
action founded on occupation, but constructive sufficient	641
but must be under landlord	641
permissive holding over sufficient	642
and old rate not conclusive	642
lies against assignee of the term	643
does not lie if premises let for an immoral purpose . .	644
destruction by fire not a defence	645
or unhealthy condition of premises	646
lies, though tenant quit before the end of the term . .	647
or landlord attempts to relet	648
otherwise, if landlord accept a new tenant	648
or evicts the tenant	649
amount of rent fixed by the agreement, though void .	650
averments in the declaration, what to be set out . .	651
when bankruptcy bars this action	652
general defences	653
tenant estopped to deny lessor's title	654
but may show failure of plaintiff's title	654
what evidence required	655

USUAL COVENANTS, what are	45, and note
-------------------------------------	--------------

USURY, vitiates lease	153
---------------------------------	-----

V.

VACANT POSSESSION, when landlord may resume 714

what constitutes	715
----------------------------	-----

VENDEE, of land is not a tenant.	25, and note
--	--------------

VENUE, when local or transitory	625
---	-----

VOIDABLE LEASE, may be confirmed	492
--	-----

but not by the tenant.	492
--------------------------------	-----

VOID LEASE , holding under	§ 19, 80
distinction between void and voidable	492
VOLUNTARY WASTE	345
(<i>See WASTE.</i>)	

W.

WAIVER , of forfeiture	497
of notice to quit	485
WAREHOUSEMAN , goods in hands of, not distrainable	588, 589
WARRANTY of fitness, none implied	382
WASTE by tenant, <i>voluntary</i> or <i>permissive</i> , <i>voluntary</i> , what is	345
acts of destruction to or permanent alteration of the premises	346
not if caused by tempest or the like	347
in respect to animals, what	347
buildings, arises from alterations, not additions merely	348
<i>permissive</i> in suffering premises to remain wasted . .	349
in respect to timber depends on circumstances	350
timber may be cut for firewood and repairs	351, 352
but not to sell	351, 353
clearing up new lands is not	353
of the clause, without impeachment of waste	355
cultivation must be according to good husbandry . .	356
<i>action of</i> , by and against whom it lay at common law	686
superseded by action on the case	687
concurrent remedy with <i>assumpsit</i> or covenant . .	688
but does not lie against tenant for permissive waste .	688
lessee liable, though waste by a stranger	689
against an executor only for waste in his own time .	689
order of a court of law to restrain	690
remedy by bill in equity by statute when	690
injunction to prevent permanent injury	691
against cutting trees	692
destroying buildings, fences, or underwood when .	693
when account will be taken	693
for and against whom a bill in equity lies	694
on what grounds injunction allowed	695
when denied	696
against tenant without impeachment of waste . . .	697
WATERCOURSE , may be leased	17
mode of enjoyment	224
its use must be reasonable	225
injury from construction of or neglect to repair dam	226

WATERCOURSE — *continued.*

right to, controlled when and in favor of whom	§ 227
cannot be materially varied if prescription relied on	228
effect of a grant bounded on	229
use of a navigable stream	229
from underground spring interference with gives no action	230
WAY , right of, may be leased	17
what and how it arises	213
when from necessity	214
servient owner not bound to repair	214 <i>a</i>
when on bank of river	215
is a qualified right	216
when to be presumed	217
when extinguished	217
WAY-GOING CROP , when tenant entitled to	542
(<i>See CROP.</i>)	
WEAKNESS OF MIND , will not avoid lease	98
WILL , tenancy at, rent due on if not strictly at will	15
tenancy at, how created	59
nature of this tenancy, when general and when strict	60, 61
general tenancy at will, nature of	61
determination of general tenancies, by notice	62
of strict by act of law or parties	62
not liable for permissive waste	349
not bound to repair	367
when allowed emblems	534
WINDOW , not to be broken open by party distraining	578
WITNESSES , when necessary to lease	170
WOODS	350
(<i>See TIMBER-TREES.</i>)	
WORDS , proper to a demise, what	159
construction of:	
“and” and “or”	75, <i>note</i>
“agree to let”	38, 39
“farm”	161
“forthwith” in covenant to repair	361
“from the day of date”	78
“grange”	161
“messuage”	161
“month”	77
“patroon”	12, <i>note</i>
“permitting and suffering”	321
“term”	15
“yielding and paying”	252

WRITING , unnecessary to create lease	§ 27
when necessary	28
WRONGFUL DISTRESS , action for	729
what will support	731

Y.

YEARS , tenant for, nature of his interest	54
can only be by express contract	54
must be for a time certain	70, 75
duration of, may be rendered certain by reference . .	76
or by matter <i>ex post facto</i>	75, 77
interest from entry	68, 171
lease, for seven, or fourteen, is at tenant's option . .	81
can only sue after entry	178
YEAR TO YEAR , origin of this tenancy	54
nature of this tenancy	55
who is tenant from	56
when implied from holding over	22
is essentially a term subject to notice	58
entitled to notice to quit	467
emblems	535
YIELDING AND PAYING , imply a covenant to pay rent .	252

